OTC Commodity Derivative Rulemaking at the CFTC, 2010-2016: A Cultural Political Economy Approach

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ABSTRACT

Rulemaking undertaken by the Commodity Futures Trading Commission (CFTC) between 2010 and 2016 for the regulation of over-the-counter (OTC) commodity derivatives comprised an essential component in the implementation of the post-financial crisis Dodd-Frank Act reforms. This study analyzes how the CFTC determined which OTC commodity derivatives would be regulated pursuant to the Dodd-Frank regime, examining the administrative agency's rulemaking for commodity and trade options in addition to the so-called forward contract exclusion. The rulemaking analysis is informed by the theoretical framework of Cultural Political Economy (CPE). In following this analytical approach, this research identifies and assesses how semiotic and extra-semiotic factors interacted and co-evolved to influence how CFTC policymakers constructed the regulation of OTC commodity derivatives and, thus, variation in, and the selection and retention of, these officials' codified regulatory stance(s) towards these same financial instruments. This study also posits a Dodd-Frank imaginary, and traces how, and explains why, it evolved over the multi-step OTC commodity derivative rulemaking sequence. It is demonstrated that, as well as explained why, CFTC policymakers' construction of OTC commodity derivative regulations changed over the course of the six-year rulemaking span to largely exclude or exempt from regulation under the Dodd-Frank Act the OTC commodity derivative transactions of most marketplace participants.

LAY SUMMARY

This study examines the U.S. Commodity Futures Trading Commission's (CFTC) rulemaking for OTC commodity derivatives (i.e., a type of financial instrument, or contract, in energy or metals) between 2010 and 2016. More specifically, this research project analyzes how the CFTC determined which OTC commodity derivatives it would regulate under the post-financial crisis reforms of the Dodd-Frank Act of 2010. This is accomplished by assessing rulemaking for the regulation of commodity and trade options as well as for the so-called forward contract exclusion. Together, these rule-makings define which OTC commodity derivatives the CFTC elected to regulate pursuant to the new Dodd-Frank regulatory regime. This research seeks to explicate how the CFTC policymakers constructed the regulation of OTC commodity derivatives, and to analyze the influences that conditioned regulatory formation and, thus, the selected regulatory approach(es) for determining which OTC commodity derivatives would be regulated.

To accomplish as much, the study begins by providing the reader with the requisite vocabulary needed to engage with the later analysis of the 2010 through 2016 rulemaking period. The thesis then turns to reviewing existing literature on the administrative process of rulemaking, as well as explaining the study's theoretical and methodological commitments and procedures, respectively. The last part of the study provides historical context to the analyzed rulemaking sequence and comprises an analysis of the 2010 through 2016 OTC commodity derivatives rulemaking period. In short, it is found that at each rulemaking juncture, CFTC policymakers constructed the regulation of OTC commodity derivatives differently and, accordingly, defined which OTC commodity derivatives would be regulated in (at least slightly) different ways. This was the case because of the variable and intersecting influences that contested and conditioned the various rule-makings for commodity (and trade) options as well as for the forward contract exclusion.

Most notably, after the arrival of new CFTC leadership in 2014, the CFTC – led by then-Chairperson Timothy Massad – undertook a review of the OTC commodity derivative regulations made between 2010 and 2012 under the direction of his predecessor, Chair Gary Gensler, in an effort to address the concerns of a significant portion of business actors who utilized these derivative instruments. As a result, the CFTC relied on many of the formal rule-related comment letters submitted by these actors to inform the revised rules which defined the OTC commodity derivatives that would be regulated under Dodd-Frank. The effect of this was that OTC commodity derivative transactions of most business actors would either be excluded or exempted from regulation (i.e., not regulated).

LIST OF ESSENTIAL ABBREVIATIONS

ACF	Advocacy Coalition Framework
BP	British Petroleum
CCP	Central Counterparty
CFTC	U.S. Commodity Futures Trading Commission
CPE	Cultural Political Economy
FERC	Federal Energy Regulatory Commission
FSOC	Financial Stability Oversight Council
GAO	U.S. Government Accountability Office (formerly, U.S. General Accounting Office)
ICE	Intercontinental Exchange
ISDA	International Swaps and Derivatives Association
LTCM	Long-term Capital Management
MSP	Major Swap Participant
NFA	National Futures Association
NYMEX	New York Mercantile Exchange
OTC	Over-the-counter
SD	Swap Dealer
SEC	U.S. Securities and Exchange Commission
TARP	Troubled Asset Relief Program
US	United States of America

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INTRODUCTION

In the aftermath of the 2007/2008 financial crisis, political leadership in the United States (U.S.) sought to reform financial markets through the enactment of the Dodd-Frank Act of 2010. As part of the adoption of this legislation, U.S. administrative agencies were directed by Congress to implement, through undertaking rulemaking, the law's reforms. To put it simply, rulemaking was the process through which these agencies wrote the financial regulations prescribed by Dodd-Frank. One of the administrative agencies that was empowered to engage in rulemaking was the Commodity Futures Trading Commission (CFTC, Commission). Through this administrative agency process, the CFTC codified and promulgated numerous Dodd-Frank era regulations that affected various financial markets and financial instruments, including OTC commodity derivatives.

Since its establishment in the 1970s, the CFTC has been tasked with the regulation of commodity derivatives (i.e., contracts for the future purchase or sale of commodities whose value is derived from the contracted commodities) in the U.S. While the primary thrust of this administrative agency's initial regulatory task was to regulate the futures markets – central exchange markets which, at that time, were principally used for commodity derivative-related transactions – through the Dodd-Frank Act, the law empowered the Commission to regulate much of the country's bilaterally transacted over-the-counter (OTC) derivative activity, such as those swap contracts[1] that gained notoriety as contributing factors to the aforementioned financial crisis. Pursuant to Dodd-Frank, and, on occasion, in conjunction with other U.S. administrative agencies, the CFTC was responsible for both elaborating on *which* OTC derivatives would be subject to the new Dodd-Frank

[1] The definitions of such financial terms can be found in either the next chapter or in the Glossary of Appendix E.

regulatory regime, and on *how* these instruments would be regulated. Although the answer to the latter was, generally, to apply the logic of existing futures (exchange) market regulation to OTC derivatives, answering the former required that Commission policymakers consider a multitude of derivative contract-related factors in order to codify a thorough definition of a Dodd-Frank-regulatable OTC derivative. This was particularly the case with regard to determining which OTC *commodity* derivatives would be regulated in the context of the heterogeneous commodities marketplace. That matter constitutes the precise policy-related subject into which this thesis inquires.

Notwithstanding their relatively small share of the overall OTC derivatives marketplace, at least in terms of notional value (Helleiner 2018: 199), OTC *commodity derivatives* (i.e., those derivative contracts in energy and metals) are anything but limited in prevalence of use for the functioning of modern societies. For instance, a contract entered into by a homeowner for the future delivery of heating oil is an OTC commodity derivative. Other examples include the purchase for future delivery of a firm amount of iron and coal by a state-owned steel mill, or the future sale into the national electrical grid of a variable amount of electricity produced by a collection of off-shore wind turbines controlled as a joint venture between publicly-traded companies. Nevertheless, OTC commodity derivatives can also be, and have been, employed in speculative capacities so as to allow a transacting party the ability to profit from commodity price fluctuations and price arbitrage opportunities. These sorts of OTC commodity derivative transactions often do not result in the transfer of ownership of the underlying commodity (e.g., the commodity is not delivered to the purchaser of the OTC commodity derivative contract), are more complicated in nature than the above examples (i.e., having exotic and complicated contractual structure), and typically involve parties with, at least, a degree of sophistication and experience in OTC commodity derivative trading, such as multinational corporations like BP and ExxonMobil.

Given the diversity in uses for, the varied contractual structure of, and the range of parties to OTC commodity derivatives, adequately defining which of these derivative instruments would be regulated and, thus, subject to the transparency enhancing and systemic risk reducing regulatory architecture promoted by the post-financial crisis Dodd-Frank Act, was foundational to the CFTC's regulatory efforts under that new legislative regime. Through the administrative rulemaking process – one which can be influenced by a range of factors, and one in which contestation from regulatory stakeholders routinely occurs – the Commission accomplished this feat. Determining which OTC commodity derivative were to be regulated was completed between 2010 and 2016 through both the CFTC rules for *commodity* and *trade options* as well as for the so-called *forward contract exclusion to the 'swap' definition.*

These rule-makings, in each of their iterations, are the policy-specific focal points of this study's inquiry into OTC commodity derivative rulemaking. Exploring the construction of the regulations contained therein and assessing those factors that interacted and co-evolved to condition their construction through rulemaking serve as the analytical foci of this thesis. While many other matters are touched upon in the pages that follow, sight on this focus should not be lost.

It bears noting that this study's research into which *OTC commodity derivative*s the CFTC would regulate is novel, and, as such, it fills an important gap in the emerging literature on Dodd-Frank era rulemaking at the Commission. Existing literature on rulemaking at the CFTC from this period has yet to delve into the agency's definitional rulemaking. Rather, this extant research has, predominantly, either broadly analyzed the influence of business and non-business actors on overall Dodd-Frank-related Commission rulemaking, or examined rules relating to *how* the agency would regulate an OTC derivative (e.g., the position limits rule). Nevertheless, forming an understanding of how CFTC policymakers determined which OTC commodity derivatives would be regulated is of central importance to literature on Dodd-Frank era rulemaking at the Commission given that such an understanding can provide critical insight into a bedrock – and highly contested – component of the CFTC's Dodd-Frank regulatory infrastructure. Therefore, the instant research contributes to this scholarship, a longitudinal, qualitative analysis of Commission OTC commodity derivative rulemaking from 2010 through 2016.

In addition to contributing to the emerging literature on Dodd-Frank era rulemaking, this research also contributes to the broader administrative agency rulemaking scholarship. Contributions to general rulemaking literature include the following: (1) a structured case study that spans the entire rulemaking spectrum, from the pre-proposal stage to revisions to once finalized rules; (2) an integrated micro- through macro-level analysis of rulemaking, which engages with considerations from rule content to those relating to political economy; and (3) a prime example of the contingency of outside party (e.g., regulatee) influence on rulemaking as well as of the importance of under-researched considerations such as the recontextualization of existing regulatory precedent during rulemaking and an agency chairperson's influence on the character of rulemaking.

While making a novel contribution to existing rulemaking literature is the primary motivation behind this study, a secondary motivation is also worth noting. Namely, this researcher worked extensively on formulating a compliance regime for the OTC commodity derivative regulations explored herein while being employed in the energy industry. As such, keen interest was spurred as to how the analyzed regulations were constructed by CFTC policymakers.

The analysis of both the commodity (and trade) options and the forward contract exclusion to the 'swap' definition rulemaking will provide the requisite information to answer this thesis's main research question: **how CFTC policymakers constructed the regulation of OTC commodity derivatives between 2010 and 2016**. Additionally, this analysis will provide perspective on the following sub-research questions that were developed as based on this research project's theoretical framework (discussed below): (1) *What imaginaries pertaining to the regulation of OTC commodity derivatives were present during rulemaking?* (2) *To what regulatory considerations did CFTC policymakers grant significance during rulemaking?* (3) *Why were certain regulatory approaches selected and retained by CFTC policymakers when rulemaking, and what influenced this selection and retention?* (4) *Did the imaginaries change during the OTC commodity derivative rulemaking process? If so, how?*

To fully explore these questions, this study is informed by the theoretical framework of Cultural Political Economy (CPE). By taking a CPE approach to the analysis of rulemaking, those factors that conditioned the construction of OTC commodity derivative regulations will be identified. Furthermore, the analysis will assess how these variables interacted and co-evolved to condition the construction of OTC commodity derivatives regulations. As core concept from CPE is the existence of (policy) 'imaginaries' (i.e., approximate frames of reality which emerge as a by-product of actors' attempts at complexity reduction). The analysis of OTC commodity derivative rulemaking will also consider the notion of a Dodd-Frank imaginary – one through which policymakers viewed their regulatory efforts to increase transparency and reduce the systemic risk of OTC derivatives – and how that imaginary's meaning, in relation to OTC commodity derivatives, may have changed during the administrative process of rulemaking.

Following a CPE approach to the analysis of OTC commodity derivative rulemaking advances this theoretical framework into a field of research (i.e., rulemaking) currently left unexplored in CPE-related literature. One benefit of utilizing CPE is that it allows the researcher to go beyond the analytical limitations of existing approaches to rulemaking analysis. As such, employing CPE to inform an analysis of an agency's rulemaking can elicit a nuanced micro- through macro-level, multifaceted understanding of this administrative process.

In terms of an advance roadmap regarding the route to be taken in this thesis on OTC commodity derivative rulemaking at the CFTC between 2010 and 2016, the present Introduction is to be followed by three separate and distinct Parts – each with their own chapters – and a Conclusion, which endeavors to complete the circle or finish the tapestry woven by the study's various strands.

Part I consists of two chapters which provide requisite background information for the reader to wholly engage with the later analysis of OTC commodity derivative rulemaking. Chapter 1 defines key derivative-related terminology and explores the two markets – exchange-traded and OTC – in which derivatives are transacted. Chapter 2 introduces the U.S. system of administrative agencies, the rulemaking process, and the CFTC.

Part II comprises three chapters, and provides the analytical grounding for the study's analysis of OTC commodity derivative rulemaking. Chapter 3 is composed of a two-section literature review. The first section provides an overview of how existing literature conceptualizes rulemaking and approaches the analysis of this administrative process. The second section explores what the extant rulemaking literature has identified as important considerations, or factors, to the construction of rules. Herein, three bodies of rulemaking-related literature are critically discussed: (1) that examining the CFTC's Dodd-Frank rulemaking process and the influences thereon, (2) that regarding the influences on and inputs into administrative agency rulemaking in general, and (3) that pertaining to theories of regulatory capture. Chapter 4 sets out and explains the central tenets of the CPE theoretical framework and its relation to other analytical approaches to the study of rulemaking, the theory's application in existing literature, and how this project employs CPE to its OTC commodity derivative rulemaking research focus. Chapter 5 details this study's data selection and collection practices and its methodology. In its elaboration on methodology, Chapter 5 develops a methodological procedure to be followed in the CPE-informed analysis of OTC commodity derivative rulemaking.

Part III of this study is composed of five chapters, with the latter four, together, comprising the analysis of OTC commodity derivative rulemaking at the CFTC between 2010 and 2016. Chapter 6 reviews the CFTC's historical involvement with the regulation of OTC derivatives, broadly, and OTC commodity derivatives, specifically. This review traces OTC (commodity) derivative regulatory developments from the agency's inception in 1974 until the passage of the Dodd-Frank Act in 2010, and discusses various themes that will be re-examined in ensuing chapters. Chapter 7 discusses the Commission's promulgated advance notices of proposed rulemaking for 'Agricultural Swaps' – the precursor release to the agency's proposed rule for commodity (and trade) options – and for the definition of a 'swap'. Chapter 8 presents and analyzes the proposed rule for commodity (and trade) options and the proposed forward contract exclusion to the 'swap' definition rule. Chapter 9 then assesses the final versions of these rule-makings. Chapter 10 concludes the overall analysis by engaging with the CFTC's revisions to the commodity (and trade) options rule and its revisions to the forward contract exclusion.

In this research inquiry's Conclusion, the study's main findings will be reiterated, the research questions will be once more raised and, then, answered, the study's contributions to the literature reviewed in Chapter 3 will be made, and a few ideas for further rulemaking research will be presented. To generally foreground the findings, during each of the demarcated junctures in this rulemaking process (e.g., proposed rulemaking and final rulemaking), CFTC officials constructed the regulation of OTC commodity derivatives in slightly different ways. These changing regulatory constructions were influenced by the variable interaction and co-evolution of several relevant factors. Moreover, as rulemaking progressed, the Dodd-Frank imaginary itself, the very lens through which agency policymakers viewed their regulatory endeavors, evolved because of these same intersecting influences. The approach to defining which OTC commodity derivatives would be regulated that Commission policymakers ultimately adopted reflected a view that the OTC commodity derivative transactions of most marketplace participants – such as energy companies and other non-financial enterprises – would be either largely excluded or exempted from regulation under the Dodd-Frank Act (i.e., not subject to compliance with the Act's regulatory infrastructure). As a result, for these same commercial parties, the regulation of OTC commodity derivatives in 2016 closely resembled that of the pre-Dodd-Frank period.

PART I – BACKGROUND CONSIDERATIONS TO OTC COMMODITY DERIVATIVE RULEMAKING

PREFACE

This first portion of the thesis consists of two chapters. These chapters provide background information necessary for the reader to engage with the analysis of OTC commodity derivative rulemaking. In the first chapter, derivative-related terms are defined, and an exploration the two markets – exchange-traded and over-the-counter – in which derivatives are transacted is carried out. The second chapter introduces the U.S. system of administrative agencies and the rulemaking process. This chapter then presents the administrative agency responsible for regulating OTC commodity derivatives – the CFTC. In doing so, a succinct overview of the CFTC's legislative origin and administrative structure is provided.

As alluded to in the Introduction, and as will be elaborated below, a financial derivative (or, a derivative) is a type of contractual financial security (instrument).[2] Derivatives have existed in some form since the intersection of written language and commerce (Weber 2009: 434). For instance, contracts for the future delivery of an asset at an agreed to price – i.e., forward contracts – have likely been in use since as early as the fourth to second millennium BCE (Weber 2009: 434; Swan 2000). More complex derivatives, such as option contracts, have their first recorded use – as referenced in Aristotle's *Politics* – with Thales of Miletus (624-546 BCE) in Asia Minor (Taleb 2012: 173f). The development of these early derivatives revolved around transactions for the future purchase and sale of commodities, such as wood, barley, and sesame seeds, and emphasized the credibility of an individual's promise to fulfill a forthcoming obligation (Weber 2009: 434). Some of these derivatives, such as forward contracts, served to manage risks associated with the future deliverable quantity of and potential future price for commodities, while other derivative agreements, like the option agreements employed by Thales of Miletus for the future right to use local olive presses (Taleb 2012: 173f), were speculative in nature. Although myriad derivative products are presently available for use, and their utilization in contemporary finance is widespread, modern derivatives maintain the same fundamental feature of their ancient predecessors – the contracted future performance of an obligation undertaken to either manage risk(s) or to speculate.

The first derivative transactions are posited to have been traded in an over-the-counter manner (Weber 2009: 432). This means that two or more individuals came together, negotiated, and agreed upon the terms and conditions of the transaction. With

[2] 'Financial derivatives' are understood to be synonymous with the colloquial term 'derivative'.

the development and exchange of so-called *Monte shares*[3] in Renaissance Italy, a new market for transacting derivatives began to emerge – exchange markets (Weber 2009: 438). By the 16th century, the first centralized exchange market for large scale trading of derivative contracts developed in Antwerp (Poitras 2009: 21). Similar to exchange derivative trading of the present day, at the Antwerp exchange, derivative transactions neither necessitated the physical transference of the contracted commodity (Weber 2009: 439) nor required that the two parties initiating the transaction be the same parties completing the transaction (Poitras 2009: 16). Rather, money could be delivered in lieu of the contracted commodity and the contract itself – not physical commodity – could be made available to trade, respectively (Poitras 2009: 15).

Given the topic of this thesis, it is pertinent to consider that the historical development of derivatives, and the two markets in which these financial instruments are transacted, has been intimately tied to commodity transactions. To this day, derivatives are extensively traded in both over-the-counter and exchange markets. The following sections will explore key categories and features of derivatives in addition to providing an overview of these two markets. In discussing over-the-counter markets, the master, or paradigmatic form of agreement – i.e., International Swaps and Derivatives Association (ISDA) agreement – governing over-the-counter derivatives transactions will be introduced. Undertaking this two-part exploration will build the vocabulary necessary to engage OTC (over-the-counter) commodity derivative regulations.

[3] City-state bonds with transferable obligations which allowed these securities to be traded to and between non-original parties to the credit agreement (Pezzolo 2007: 4ff).

FINANCIAL DERIVATIVES

In the abstract, a derivative is a financial security (instrument) which derives its value from an underlying asset (Koppenhaver 2010: 6). Such an asset may be, but is not limited to, a physical commodity, a share of common stock, an index of stocks or commodities, another derivative, or myriad other referents (Raines and Leathers 1994: 197). Practically, however, a derivative is a contractual agreement between two or more parties for future performance of contracted terms, and whose value is derived from an underlying asset or transaction (Koppenhaver 2010: 6). While manifold names are attributed to specific derivatives, derivatives can be understood to fall under four general categories: forwards, futures, options, and swaps. Those OTC commodity derivatives referenced in the rulemaking analysis undertaken in Part III of this thesis fall under the broad categories of OTC forwards, options, and swaps that are used to transact energy (e.g., natural gas) and metal (e.g., aluminum) commodities, and include more specifically named OTC commodity derivative instruments like ‘commodity options’ and ‘trade options’.

Forward contracts are agreements to buy or sell a specific asset at a specific time in the future for an agreed upon price (Hull 2014: 6). These contracts are generally entered into between two parties in an over-the-counter manner, are of non-standardized terms and conditions, and often result in the actual delivery of the contracted asset (Hull 2014: 6f). Forward contracts are utilized across many product (e.g., commodity, currency) markets.

For instance, a forward contract might be used by a multinational bank in the Maldives to lock in a 3-month forward exchange rate of Maldivian rufiyaa to U.S. dollars by privately negotiating the transaction with a U.S. multinational bank. Similarly, a midstream petroleum company in Oklahoma might use a forward contract to purchase 1,000 barrels of crude oil per day from an upstream petroleum company for the next 6 months at $50 per barrel, and then use another forward contract to sell for $57 per barrel the same 1,000 barrels of crude oil per day to a downstream petroleum company for the 6 months during which it receives delivery of the oil from the producer. In both of these examples, there exists an underlying asset referent – an exchange rate, and crude oil, respectively – and the future obligation of performance – delivery of the 3-month forward exchange rate, and delivery of the crude oil, respectively.

Similar to forward contracts, futures contracts are agreements to buy or sell a specific asset at a specific future time for an agreed upon price. There exist, however, three key differences between futures and forward contracts. First, futures contracts are entered into and traded on exchanges, not over-the-counter (Hull 2014: 1f, 24). Second, these contractual agreements are standardized – in that the terms and conditions of the contract are not privately negotiated, but are pre-set by the exchange on which the agreements are offered (Hull 2014: 24). Third, futures contracts are frequently financially settled, thus actual delivery of the asset that serves as the underlying referent rarely takes place (Hull 2014: 24). This last point is important because it allows for futures contract users to utilize the agreement for speculative or hedging purposes.[4] Hedging with a futures contract is often linked – particularly in relation to commodities transactions – with contractual performance under a forward contract.

An example of a futures transaction in the contemporary electronic trading environment would be of a buyer selecting to purchase 5,000 bushels of wheat for 1-month delivery at $2.00 per bushel from a pre-set futures sales contract with the same terms on the Chicago Mercantile Exchange's (CME) electronic trading infrastructure. To highlight the

[4] Often, a futures agreement is entered into in an effort to hedge the position of an underlying forward contract (i.e., a forward contract for the purchase of a certain amount of soybeans is hedged by a futures contract for the sale of the same amount of soybeans).

decision to financially settle as opposed to the requirement to receive delivery of the wheat, the purchaser of this futures contract could close out its futures position by entering into an opposite trade for the same amount and delivery date – thus, eliminating its requirement to physically settle the contract – the day before it was scheduled to take delivery of the wheat.

The third commonly traded financial derivative is an option. Option contracts come in two main forms: calls and puts (Hull 2014: 7). Call options give the option holder the right, but not the obligation, to buy an asset for a certain price on or up to a certain date (Hull 2014: 7).[5] Put options give the option holder the right, but not the obligation, to sell an asset for a certain price on a certain date (Hull 2014: 7).[6] When the option is entered into – thus purchased for a price called the option premium – the option contract is executed. If the optional right to buy or to sell is invoked, the option is said to be exercised. Regarding the trading environment of options contracts, trading can be done either on exchanges or in an over-the-counter manner (Hull 2014: 7, 227). Options are distinguished from both forwards and futures in that performance under the contract is at the discretion of the holder (Hull 2014: 210). Nevertheless, like futures contracts, options can be used for speculative and hedging purposes (Hull 2014: 11).

As a practical example of both a call and a put option, consider the following. Should an investor wish to speculate on a price increase of a Henry Hub natural gas futures contract from, let us say, a current price of $4.50 per 10,000 MMBTU,[7] the investor could access the CME Group exchange platform and purchase a one-month call option with a so-

[5] Connoted by this is that the counterparty to this transaction maintains the obligation to sell the asset for a certain price at a certain time should the option be exercised – this is known as ‘writing an option’.
[6] Likewise, the counterparty to this transaction maintains the obligation to buy the asset for a certain price at a certain time should the option be exercised.
[7] An MMBTU is equal to 1,000,000 British thermal units, or BTUs.

called strike price of $5.50 per 10,000 MMBTU for a $0.50 option premium. In the event that the natural gas futures contract rises above $6.00 per 10,000 MMBTU during the one-month duration of the contract, then the investor could exercise the call option and realize a profit. If, however, for whatever reason, the investor decides not to exercise her call option, she will not lose any more than the $0.50 option premium. Unlike with futures contracts, losses associated with options are capped to the amount paid in option premium (Hull 2014: 17).

Likewise, if an investor wishes to hedge an investment in 100 owned shares of common stock, purchasing a put option on the same shares of stock, through an optional sale of the 100 shares, may be of use.[8] This hedge could be done in the over-the-counter market whereby the investor negotiates a put option directly with a bank. Once executing the put option, the investor will maintain the right to sell 100 shares of that common stock at a predetermined strike price until the expiration of the contract. While hedging with a put option in this instance will not result in profit, by locking in a specific sale price for the common stock, it does serve as a sort of insurance against the decline of the stock's price. As with the aforementioned call option on Henry Hub natural gas, losses associated with this put option cannot exceed the option premium (Hull 2014: 17).

The final general category of financial derivatives is the swap. Of the four referenced categories, swaps are the most recently developed – the first swaps being transacted between the mid-1970s and the early 1980s (Hull 2014: 158; Decovny 1998). Notwithstanding their relatively new development, swaps have become an integral component of the financial derivatives market (Hull 2014: 158). In its basic form, a swap is a contractual agreement to exchange cash flows in the future (Hull 2014: 158). Such

[8] Consider that owning shares of common stock is valuable only if the share price increases.

transactions have historically only taken place in an over-the-counter manner,[9] and much like futures and options, can be used for speculative and hedging purposes (Kuserk 2010: 45; Decovny 1998).

Although myriad forms of swaps exist given their bespoke crafting, there are five principal classes of swaps – each corresponding to an asset referent. These classes of swaps include interest rate, currency, credit, equity, and commodity swaps. On the basis of notional value, interest rate swaps comprise the largest segment of the swaps marketplace,[10] while, by that same measure, commodity swaps comprise the smallest segment (BIS 2017).

As the particular name of each of the five classes of swaps suggests, each swap involves the exchange of cash flows in the future relating to its named asset referent. For instance, in its basic, "plain vanilla" form, an interest rate swap is a contractual agreement to exchange the cash flows of a fixed interest rate on a notional principal for the cash flows of a floating interest rate on the same principal at various junctures over an agreed upon term (Hull 2014: 158f). A currency swap is somewhat similar in that it involves the exchange of interest payments – thus, cash flows – denominated in one currency for those denominated in another currency (Hull 2014: 178, 183f).[11] Credit swaps, specifically credit default swaps (CDS), are means of insuring against the risk of default by a company or country (Hull 2014: 187f). Generally, these swaps entail one party agreeing to make periodic payments to a counterparty for a set amount of time in exchange for the right to

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[9] As will be discussed throughout this thesis, under the new Dodd-Frank regulatory regime, a fundamental policy objective has been to move swap trading from over-the-counter markets to exchange markets.
[10] Total face value of an asset position; not the amount of money paid for the asset position or owed to the counterparty. See the following: http://www.cftc.gov/MarketReports/SwapsReports/ExplanatoryNotes/index.htm.
[11] Depending on the contractual terms, the principal on which the interest is being paid may or may not be exchanged as well (Decovny 1998: 53f).

sell the counterparty's bonds – and the counterparty's obligation to buy these bonds – at their face or mid-market value in the event that the counterparty goes into default by a certain date (Hull 2014: 187f). An equity swap is an agreement whereby the parties exchange the payments of the returns of an equity (stock) index as applied to a notional principal for the payments of a fixed or floating interest rate as applied to that same principal for an agreed upon duration (Hull 2014: 189, 495).

The final class of swap is the commodity swap. A commodity swap involves the agreement to exchange a series of cash flows based on a fixed price for a commodity, over a period of time, in return for the cash flows from a floating, market-based price of the same commodity, over a set period of time (Hull 2014: 189, 497). As a commodity swap entails a physically deliverable asset referent, it is important to note that the underlying commodity is *not* delivered when performance of the swap contract is achieved. Commodities used as asset referents for these swap contracts range from agricultural products (corn, wheat, soybeans), to metals (copper, gold, silver), to energy products (crude oil, natural gas, and electricity), among others. An example of a commodity swap is when a natural gas consuming electric utility agrees to pay $5.00 for 10,000 MMBTU of natural gas on the 28th of each month for one year to a natural gas pipeline company in exchange for receiving, from the pipeline company, the cash flows generated from the floating, market price of natural gas for 10,000 MMBTU as settled on the 28th of each month for one year.

In relation to their regulation, having a basic understanding of these four categories of derivatives is important for one primary reason – the disparate structures and risk management features of each category of derivative can necessitate likewise disparate approaches to their regulation. Although myriad other derivative products can themselves be derived from these four categories, each of these will maintain key features of either forwards, futures, options, and/or swaps. Owing to their individually-tailored nature, derivatives which amalgamate structures and risk management features from across any of the categories of derivatives are largely created and traded in over-the-counter markets. Since this specific research project has its focus centered on OTC commodity derivative regulations alone, futures contracts, futures markets, and their regulation receive no more than passing reference and the attention necessary to provide contextual background. Nevertheless, as the workings of and the regulations governing exchange markets[12] have ostensibly provided a partial framework for regulating OTC markets under the Dodd-Frank regulatory regime – of which is said herein – a brief exploration of exchange markets is essential.

EXCHANGE MARKETS

Derivative exchanges have their earliest recorded organization in the early 1700s in Osaka, Japan (Blank et al. 1991: 2f; Schaede 1989).[13] Here, at the Dōjima exchange, futures contracts on rice were traded at a physically located marketplace (Blank et al. 1991: 3; Schaede 1989). Then, by 1848, the Chicago Board of Trade (CBOT) was established in the U.S., giving that country the first organized physical venue at which to trade futures contracts on a variety of commodities (Kolb 1991: 4). The CBOT, in similar fashion to many other derivative exchange markets of the 19th and 20th centuries, traditionally used an open-outcry system of trading (Hull 2008: 3). Open-outcry involves traders meeting in a trading pit or on a trading floor and either shouting bids (purchase price) or offers (sell

[12] Recall above that futures contracts are exclusively traded in exchange markets.
[13] While the Osaka exchange is the first historical example of an organized derivative exchange, the origins of futures exchange markets can be traced to Europe in the Middle Ages (Hull 2008: 2; Chancellor 2000: 6-10).

price) or using hand signals to indicate one's bids or offers for derivative products. Through this system, the derivative positions that a trader takes are, in principle, known to the other traders (Kolb 1991: 5).

Presently, however, while open-outcry systems of derivative trading on exchanges such as the CBOT remain in vestigial existence – thus, at least in name, warranting the categorization of derivative exchanges as markets or marketplaces – trading of futures and options on exchanges has increasingly transitioned to electronic platforms with a user interface (i.e., on computers) (Hull 2008: 3). Nevertheless, many of the benefits associated with open-outcry trading are not perceived to be lost because of the transition to electronic trading platforms. Through the electronic exchange's continual re-pricing of and re-statement of prices on derivative products resulting from the bids or offers of electronic traders using the platform, electronic trading platforms are designed to virtually replicate many of the interactions that take place in the trading pit.

As noted in the previous section, all futures contracts and some options contracts are traded in exchange markets. Both futures and options contracts which are traded on exchanges have their terms and conditions standardized by the exchange on which they are traded. This means that it is the exchange which presents the traders with the contracts – detailing product quantity, quality, delivery location, and delivery time – on which they make bids or offers (Blank et al. 1991: 3). The exchange originates the terms and conditions of the derivative contracts which it then supplies to prospective buyers and sellers, and then facilitates the purchase or sale transactions on behalf of the traders. Thus, private negotiation between traders of contractual terms and conditions does not occur.

The regulations with which the operations of derivative exchange markets must comply spring from self-established rules, rules of clearinghouses utilized by the exchanges, rules of the non-governmental National Futures Association (NFA), and federal government regulations (Blank et al. 1991: 9; Kolb 1991: 27-32). Substantial academic literature on the history of exchange market regulations exists,[14] however the development of such rules and regulations is not the focus of this study. Nevertheless, several concepts and terms associated with these rules and regulations are germane to understanding the regulation of OTC commodity derivatives under the Dodd-Frank regulatory regime. These include the following: clearing, clearinghouse, novation, margin requirements, and position limits. Standardization of contacts, briefly described above, is another key feature of exchange markets; but nothing more will be here added to that discussion.

When a trade (purchase or sale) is executed for a derivatives contract on an exchange, the process of clearing the transaction is undertaken. Clearing begins with a clearinghouse – a party often separate from but serving as an adjunct to the exchange – assuming the trader's position: either the purchase or sale (Kolb 1991: 8; Edwards 1983: 370). This act of assuming the derivatives transaction is known as novation (Griffith 2013: 14). At this time, the clearinghouse also matches the transaction with a trader taking the opposite position – either a sale to a purchase or a purchase to a sale – and novates this position (Kolb 1991: 8f). Thus, the clearinghouse "adopts the position of buyer to every seller and seller to every buyer" (Kolb 1991: 8). The result is that traders have contractual obligations solely to the clearinghouse and that the clearinghouse guarantees the performance of all exchange market trades for which it is responsible (Kolb 1991: 8; Edwards 1983: 370). Given that a clearinghouse becomes the counterparty to the transactions on a derivatives exchange, it is sometimes referred to as a central counterparty (CCP).

[14] See, for example, Pashigian (1986), Markham (1987), and Keaveny (2005).

Once the transaction is novated by the clearinghouse, the clearinghouse is responsible to maintain margin from the buyer and seller. Margin is the predetermined amount of capital[15] that a trader must deposit when he or she executes a derivative transaction in an exchange market (Blank et al. 1991: 10f). This is known as initial margin (Kolb 1991: 11). As derivative transactions involve the passage of time before the fulfillment of contractual terms – e.g., the purchase of a futures contract on May 1st for delivery of 1,000 barrels of crude oil on June 1st – they are subject to continual revaluation. The initial margin account will reflect these changes in value. Thus, due to a decline in the value of a derivative contract beyond a predetermined threshold (i.e., maintenance margin), a margin call may be issued for the trader to replenish his or her margin account (i.e., variation margin) (Kolb 1991: 11).

The final concept that is important to note is that of position limits. Position limits denote the maximum number of derivative contracts that a trader may hold (Hull 2008: 25, 195). Historically, these limits have been set by the exchange on which the contracts are traded (Hull 2008: 195). Further, position limits generally only apply to those traders who engage in speculation as opposed to those engaging in hedging (Kolb 1991: 38). This means that traders who purchase or sell exchange derivatives without an underlying stake in the, or a similar, derivative asset referent are subject to position limits; but that those traders who purchase or sell exchange derivatives with an underlying stake in the, or a similar, derivative asset referent are not subject to such limitations.

Each of these concepts serve an essential role in the operation of derivative exchange markets. Standardization of contracts, for instance, are posited to cultivate a broad and deep market of potential buyers and sellers (Carlton 1984: 238), to improve

[15] This can include money or monetary instruments including, but not limited to, stocks and bonds.

liquidity[16] (Taleb 1997: 29), and to reduce costs associated with moral hazard[17] of potential buyers and sellers (Telser and Higinbotham 1977: 970f). Additionally, the process of clearing and the function of clearinghouses are meant to assure the financial integrity of both derivative exchange transactions and of those traders clearing their transactions through the clearinghouse (Edwards 1983: 370). Moreover, requiring margin serves to mitigate the credit risk[18] posed to the derivative exchange by traders and to ensure that traders honor the contractual obligations of their derivative positions (Hull 2008: 29; Kolb 1991: 10). Finally, position limits are understood to prevent any one trader from unduly influencing the derivative product market in which he or she (or it) trades (Hull 2008: 25, 195).

OVER-THE-COUNTER MARKETS

As stated in this chapter's opening paragraph, the first derivative contracts were traded in an over-the-counter manner. It is important to understand that the use of the term OTC does not refer to a specific, well-defined physical or electronic market in which derivatives are traded; unlike exchange markets. Rather, OTC should be understood to be a method of transacting derivative contracts. To engage in OTC derivative trading, a trader must simply follow a set of off-exchange negotiating and trading practices with, at least, one other trader as counterpart. The negotiating and trading practices referenced comprise a few key features: the setting of trading, non-standardized terms and conditions of the derivative contract, the use of an ISDA agreement, and collateral requirements.

[16] Per Taleb (1997: 68), "the ease with which a [trader] can enter and exit [the market] for a given block of securities."
[17] Moral hazard occurs when a trader is not incentivized to act "honestly or with due prudence" (Law and Smullen 2008: 293).
[18] The risk that a trader may default on his or her monetary obligations (Brealey et al. 2007: 133).

The setting of OTC derivative contract trading is dependent on the type of agreement being transacted. Forward contracts can be traded in-person (resulting from in-person contractual negotiations), telephonically, or electronically (e.g., email, instant messaging, etc.). While off-exchange options can likewise be traded in these three settings, options (predominantly) and swaps (exclusively) are traded telephonically or electronically (Hull 2008: 4). Further, such transactions usually involve the use of a derivatives dealer from whom the trader either buys, or to whom the trader sells derivatives (Hull 2008: 4). These dealers serve as market makers – institutions quoting both bids and offers for the derivatives being traded (Hull 2008: 4).[19]

Another defining feature of OTC trading is the non-standardization of contractual terms and conditions of derivative contracts. In OTC markets, derivative contracts are individually negotiated by traders to include mutually agreed upon terms and conditions (Hull 2008: 4). For instance, product price, delivery amount, product quality, and delivery date, among other terms and conditions, can all be negotiated by the traders. Nevertheless, such individually tailored contracts are often governed by an overarching master agreement between the transacting parties – known as an ISDA agreement (Poloner 2010: 226).[20] It is worth noting here that this agreement – developed by and named after the International Swaps and Derivatives Association – governs the relationship between the parties transacting OTC derivatives by setting forth general credit standards, operational standards, and tax representations to which the parties must adhere if they are to trade OTC derivatives with each other (Poloner 2010: 226).

[19] Dealers that transact with other dealers are termed to engage in 'interdealer' markets, while dealers that transact the non-dealers are termed to engage in 'customer' markets.
[20] ISDA agreements are utilized for the transaction of options and swaps. Forward contracts, while potentially governed by other forms of negotiated master agreements, are not governed by an ISDA agreement.

A final key feature of the OTC markets is the posting of collateral by traders. Under the terms of a collateralization agreement – often included as an amendment to the ISDA agreement, or in the basic terms and conditions of the actual derivative contract – the parties to the derivative transaction are required to pledge a certain value of assets[21] to each other and to replenish the collateral pledge as the derivative contract is continually revalued (Hull 2008: 29). For instance, if trader A and trader B agree to a commodity swap based on the price of natural gas, and from day-to-day the price of natural gas changes and increases the value of the commodity swap to trader A, trader B must pay collateral to trader A which is equal to the change in the commodity swap's value. If, however, the change in price favors trader B, trader A must pay collateral equal to the change in the commodity swap's value to trader B. In the event that the value of the pledged collateral declines – e.g., 1,000 long futures contracts in natural gas which are no longer worth what they were at the time that they were pledged – then additional collateral must be posted to ensure full collateralization of the derivative agreement.

These key features of the OTC markets serve several important functions. Unlike with the anonymous matching of derivative positions that occurs with exchange market trading, the open setting of OTC markets allows for traders to negotiate amongst themselves. This supports the non-standardization of derivative contract terms and conditions, which in turn allows for OTC markets to foster an environment in which large, complex, and individually-tailored derivative deals can be transacted (Hull 2008: 4). Further, the ISDA agreement provides options and swaps traders with potentially legally enforceable contracted standards to which they must adhere, thus arguably mitigating various risks associated with OTC derivative trading. Finally, collateral requirements, in the absence of

[21] This can be money, monetary instruments, or monetized instruments.

exchange market-imposed margin commitments, ostensibly reduce the credit risk borne by the parties to the OTC transaction (Hull 2008: 29).[22]

[22] It should be intimated that margin and collateral are different, especially insofar as what assets qualify as margin (as set by an exchange, clearinghouse, or federal government regulation) and as collateral (as privately negotiated or as defined by generally accepted accounting standards). Moreover, as noted by Hull (2008: 29), collateralization agreements can allow a trader to increase his or her (or its) leverage (debt obligations) in connection with the trader's derivatives activity. This, arguably, weakens the notion of collateral as a tool to mitigate credit risk as, in this specific case, the assumption of increased leverage would make the trader increasingly fragile to decreases in derivative position valuation (Taleb 2012; Minsky 2008). Thus, the trader, while posting collateral to limit perceived credit risk, increases his or her (or its) exposure to other forms of risk.

Chapter 2 – U.S. Administrative Agency Rulemaking and the CFTC

Prior to exploring a condensed regulatory history of OTC commodity derivatives, it is useful to have a broad understanding of the U.S. government's regulatory structure. The hallmark of this structure is the devolution from Congress of rulemaking, market surveillance, rule compliance, and regulatory enforcement powers to administrative agencies. Through a review of administrative agency rulemaking, the reader will have a broad comprehension of the legal structure governing the U.S. CFTC's crafting of OTC commodity derivatives regulations. Along these lines, the formal rulemaking process and judicial oversight will be described. From there, the CFTC – the regulator of OTC commodity derivatives – will be introduced, with its legislative origin and administrative structure being discussed. It should be noted that this chapter does not undertake a social science analysis of either legal structure or law-in-action. Rather, this chapter simply articulates the legislated legal context in which rulemaking occurs in the U.S. regulatory system.

RULEMAKING AND JUDICIAL OVERSIGHT

Within the U.S. federal system of regulation, the complex realities of daily life can militate against it being either the Congress or the President who actually exercises the regulatory powers which either constitutionally possesses (Aman and Mayton 1993: 9-12). Instead, it is often delegated by either entity of government to a delegatee (i.e., an administrative agency), which either the Congress or the President has previously established or created, that exercises such regulatory power (i.e., rulemaking as well as regulatory surveillance, compliance, and enforcement). Apart from the constitutional dimension of governmental regulatory power, it must also be noted that there is a separate statutory dimension. Here, reference is made to the federal Administrative Procedure Act of 1946, the basic law adopted by the Congress that sets forth the procedures to be followed by all government regulatory agencies when moving forward to adopt rules and standards affecting those the agencies oversee.[23] Essentially, the Administrative Procedure Act provides for a two-step process in connection with the formulation and implementation of agency regulations, and for the granting of judicial oversight to all agency actions.[24]

Under the Administrative Procedure Act, when a regulatory agency decides to exercise delegated authority to provide rules and standards that affected commercial enterprises are required to meet, the agency first undertakes the tentative, exploratory step of issuing what is referred to as a Notice of Proposed Rulemaking.[25] The nature of the notice can run the gamut from a rather lengthy list of detailed rules cast in the language of regulations the agency is considering adopting, to a more general notice of what and how the agency would like to regulate (Aman and Mayton 1993: 296-300). Its publication appears in an official government document that is put out daily to the public known as the Federal Register. The proposed rulemaking specifically asks for comments to be submitted to the agency concerning what is being proposed. Such comments are then to be received by and reflected upon by the agency, due attention being given to the possibility of revising the original proposals when deemed appropriate (Pierce et al. 1992: 300f).

Following an allotted comment and review period, generally lasting anywhere from 30 days to more than 180 days, the concerned agency then proceeds to the second step: issuance in the Federal Register of a so-called Final Rule.[26] In addition to the actual language of the so-called Final Rule, its issuance also contains a catalogue and discussion of the comments received on the Proposed Rule, accompanied by a recounting of the agency's thinking about what comments received during the proposed rulemaking process were

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[23] See 5 United States Code (U.S.C.) sections (secs.) 551-559.
[24] On judicial oversight of agency regulatory action, see 5 U.S.C. secs. 701-706.
[25] See 5 U.S.C. sec. 553(b-c).
[26] See 5 U.S.C. sec. 553(d).

either accepted or rejected. One obvious reason for such a catalogue and discussion of the agency's thinking relates to the possibility that the adoption and application of any Final Rule might, at some juncture, be subject to legal challenge by an entity or enterprise governed by the regulation. On this score, for instance, the Administrative Procedure Act explicitly prohibits agencies from exercising delegated power in a manner that would be considered "arbitrary and capricious" and allows courts to set aside and invalidate all such non-compliant rules.[27] Ignoring or dismissing serious, substantive comments received about proposed rules would fall into that category (Pierce et al. 1992: 303-307).

Notwithstanding from those instances in which a regulatory agency has adopted rules and standards in a manner considered "arbitrary and capricious," the Administrative Procedure Act provides that power is assigned to U.S. courts to overturn or nullify regulations in certain other instances.[28] Since the judiciary's primary responsibility is to assure that a government of limited powers is not acting in a manner beyond its specific powers, or otherwise acting inconsistent therewith, the courts are often regarded as having substantial (and superior) authority to set aside and invalidate the actions of regulatory agencies (Pierce et al. 1992: 331f). While that is largely true, when looking at the jurisprudence of the courts in the United States on that matter, it is apparent that, perhaps, such a view can be carried too far. The leading case on this matter is the U.S. Supreme Court's 1984 decision on Chevron USA v. Natural Resources Defense Council, Inc., in which it was recognized that, notwithstanding the judiciary's expansive review authority,

[27] See 5 U.S.C. sec. 706(2)(A).

[28] One such instance is the overturning or nullification of a rule which fails the 'logical outgrowth test.' The doctrine of logical outgrowth stipulates that a Final Rule must be the logical outgrowth of the Proposed Rule; thus, the former should be "presaged adequately" in the Notice of Proposed Rulemaking (Kannan 1996: 214f).

interpretations and understandings of a regulatory agency about its own rules and governing statutes are entitled to deference by the judiciary.[29]

Essentially, while it is correct that the courts may be the final arbiter of what the law (regulatory or statutory) should mean, unless the courts determine that an agency's interpretations and understandings are incorrect – because there is only a single accurate interpretation and understanding that can be had – it often allows the agency's interpretations and understandings to remain intact (Pierce et al. 1992: 348-353). In many situations, there is no single interpretation or understanding. Several interpretations or understandings are reasonable. And, as long as the relevant agency has selected one of the reasonable possibilities, then the courts – who are not the experts in the matters dealt with by the agency on a daily basis – often defer to the interpretation or understanding of the agency, despite the fact that the court itself would have chosen one of the other reasonable alternatives (Pierce et al. 1992: 348-353). It requires noting, however, that the Chevron ruling has, over the years, caused consternation of the part of many who feel it encourages agency over-reach.[30] Thus, political efforts have been made, through the appointment of federal judges hostile to the so-called Chevron Doctrine, to cultivate activist courts favoring a particular policy agenda in order to erode agency regulatory power.[31]

THE CFTC

With the CFTC Act of 1974, Congress established the Commodity Futures Trading Commission as a federal administrative agency.[32] Passed by a Democratic House of

[29] See 467 U.S. 837 (Sup. Ct. 1984). This ruling is colloquially known at the 'Chevron Doctrine.'
[30] See Aman (1988: 1223-1236) and Farina (1989).
[31] What must always be kept in-mind, though, is that measures of this sort can cut both ways. With shifting political winds can come the filling of judicial vacancies that would threaten earlier prevailing ideological objectives.
[32] Public (Pub.) Law No. 93-463, 88 Statute (Stat.) 1389 (1974).

Representatives and a Republican Senate, and signed into law by Republican President Gerald R. Ford, Jr., the establishment of the CFTC created an agency separate from the Securities and Exchange Commission (SEC) which would be specifically responsible for regulating commodity transactions (Markham 2002: 45).[33] Further, the CFTC replaced its predecessor organization, the Commodity Exchange Authority – a regulatory agency within the Department of Agriculture that was established by the Commodity Exchange Act of 1936 (Markham 2002: 44f).[34]

The formation of the CFTC in the early 1970s came during a period of pronounced macroeconomic and commodity market instability. An important contributing factor to this instability was the development and proliferation of novel financial instruments, such as unregulated commodity options[35] and leverage contracts,[36] in addition to the rapid expansion of futures market activity (Markham 2002: 43). Congress sought to address the perceived ineffectiveness of the earlier Commodity Exchange Act in managing changes and disruptions to commodity (derivative) markets during this period through the establishment of the CFTC (Rechtschaffen 2014: 318; Markham 2002: 44ff; Greenstone 1977). Like its predecessor, the Commodity Exchange Authority, the CFTC was tasked with administering the Commodity Exchange Act (Lower 1978: 1111), and, thus, with regulating commodity derivatives.

[33] The SEC served as regulator of securities, such as equities (stocks).

[34] The Commodity Exchange Act of 1936 itself being derived from three preceding acts: The Cotton Futures Act of 1917; Futures Trading Act of 1921, which was ruled unconstitutional by the U.S. Supreme Court in 1922 and again in 1926; and the Grain Futures Act of 1922, which was upheld by the U.S. Supreme Court (Rechtschaffen 2014: 321; Lower 1978: 1100; Clark 1978: 1183).

[35] Per the CFTC Glossary, "An option on a commodity or a futures contract." See: http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm#C.

[36] Publicly marketed over-the-counter contracts for the future right to a commodity which require buyers to make an initial down payment and to occasionally pay fees to the seller of the contract (White and Stein 1987: 342).

The CFTC Act structured the Commission to be composed of five commissioners, of which one serves as chairperson (Rechtschaffen 2014: 319).[37] Each commissioner is appointed by the U.S. President, with the advice and consent of the Senate, to a five-year term, with the chairperson selected from among the five commissioners by the President (Rechtschaffen 2014: 319). To maintain a degree of political party independence, the Commission is prohibited from having more than three commissioners from the same political party at any time (Rechtschaffen 2014: 319). Further, housed within the CFTC are various divisions in charge of legal matters, market oversight, and regulatory enforcement, among other specializations. While the exact titles and the number of these divisions have changed since the CFTC's inception, all divisions play an integral role in the Commission's rulemaking, surveillance, and enforcement endeavors.

As an independent federal administrative agency, the CFTC was provided with rulemaking power in the domain of commodity derivative markets. Additionally, the CFTC was granted oversight and enforcement authority regarding these markets (Markham 2002: 45). Enforcement authority was also given to the CFTC, and takes the form of agency-led investigations and prosecutions of not only entities violating the Commodity Exchange Act, but of those not adhering to the agency's regulations, or improperly marketing and selling commodity futures or options products to their customers (Rechtschaffen 2014: 320; Markham 2002: 45). Nevertheless, as an administrative agency established by Congress, the CFTC is subject to Congressional reauthorization, with presidential assent, roughly every three to four years.

[37] See Appendix A for a table of all CFTC chairpersons since January 22, 1993 and all commissioners active since 2001.

PART II – ANALYTICAL GROUNDING FOR THE ANALYSIS OF OTC COMMODITY DERIVATIVE RULEMAKING

PREFACE

Moving from the presentation of background considerations, the second portion of the thesis provides the analytical grounding for the analysis of OTC commodity derivative rulemaking between 2010 and 2016. The first of this part's chapters, and the third chapter overall, comprises a two-section literature review and explains the research fields to which this study on OTC commodity derivative rulemaking contributes. The second of this part's chapters, and the fourth overall, explicates the following relating to Cultural Political Economy (CPE): (1) the central tenets of the CPE theoretical framework and how it can move beyond existing approaches to rulemaking analysis, (2) how it is applied in existing literature, and (3) how the instant study employs CPE in relation to its OTC commodity derivative rulemaking research focus. The third chapter of this part, and the fifth overall, details this research project's data collection procedures and its methodology. This chapter presents the eclectic methodological procedure followed in the CPE-informed analysis of OTC commodity derivative rulemaking.

Chapter 3 – Literature Review

To situate the forthcoming analysis of OTC commodity derivative rulemaking at the CFTC within its scholarly domain, a review of extant literature must be conducted. Broadly speaking, this analysis seeks to contribute to a better understanding regarding the field of rulemaking within an administrative agency. More narrowly, however, the effort endeavors to advance scholarly insight into financial regulatory rulemaking at the CFTC during the Dodd-Frank era. As the central theme involves how CFTC policymakers constructed the rules for regulating OTC commodity derivatives during the Dodd-Frank rulemaking period, literature relating to this theme (i.e., rulemaking) is the basic focus in this chapter. To inquire into how existing scholarly research engages with the construction of rules and regulations at the administrative agency level (a domain subsumed under the broad headings of 'public policy' and 'regulatory governance'), this chapter is divided into two sections; each of which explores distinct elements of administrative agency rulemaking research.

The first section provides an overview of how existing literature conceptualizes rulemaking and approaches the analysis of this administrative process. For instance, in much of the literature, reference is made to rulemaking as a contested process that involves a variety of actors – external and internal to the administrative agency – who seek to affect the development of regulation(s) at various sites and scales. As such, approaches to the analysis of rulemaking range from narrow rule content analysis (of the notices, comments, and replies) to examining the roles played by advocacy coalitions and/or industry interests. This section will present those actors and factors identified in the literature as significant to rulemaking, and will then concisely, yet critically, engage with a few approaches to analyzing this administrative process. The chief contribution of this section is that it highlights the need for an analysis of OTC commodity derivative rulemaking to be multifaceted in its conceptual and analytical approach, such as can be accomplished through the adoption of a Cultural Political Economy approach (see Chapter 4).

The second section explores what the extant rulemaking literature has identified as important considerations, or factors, to the construction of rules. Additionally, as this section explores those influences significant to rule development, some criticisms of the reviewed studies' in light of the instant project's research focus are concomitantly made. This section comprises three subsections emphasizing different strands of literature.

The first body of literature explored under this section's heading is that gauging the CFTC's Dodd-Frank rulemaking process and the influences thereon, in particular. This addresses the single-most closely related matter to this research project's central focus – the under-researched domain of OTC commodity derivative rulemaking – and critically examines what other authors have suggested were the influences on Commission policymakers' formulation of the OTC (commodity) derivative rules. Starting from a more general vantage than the first, the second body of literature to be taken up involves the influences on and inputs into administrative agency rulemaking in general, CFTC aside. This implicates Susan Webb Yackee's insightful analyses of government agency rulemaking processes, among contributions from other authors, and extends well-beyond the working of such processes within the CFTC itself. Finally, the third body of literature examined involves the well-established studies on, and recent advances in, theories of regulatory capture. More theoretically driven than the preceding two bodies of literature, it shares with the second a focus not confined to CFTC Dodd-Frank rulemaking. Instead, the regulatory capture literature provides a critical examination of how agencies can become the servants of those they are charged with supervising. Consequently, this literature provides a unique twist on one's perspective when it comes to the OTC commodity derivative rulemaking process.

RULEMAKING AND ITS ANALYSIS IN THE LITERATURE

Conceptualizing the Rulemaking Process in the Literature

Rulemaking is the means through which statutory public policy is implemented (Anderson 2006). As such, the rulemaking process is a key component of overall policymaking in the U.S. federal governmental system (Crow et al. 2017: 1319). Much like the enactment of legislation (e.g., the Dodd-Frank Act or the Commodity Exchange Act), the development of regulations through the construction of rules is an inherently political process that affects a multitude of stakeholders and that can be influenced by a range of factors, and one in which contestation can occur across a variety of rulemaking events.

In conceptualizing rulemaking, existing literature emphasizes the role of various actors – external and internal to an administrative agency – in conditioning the regulations developed by an agency through this administrative process (Moe 2012). One such approach to understanding rulemaking posits the existence of an 'iron triangle' of actors involved in regulatory formation (Duffy 2003). In this conception of rulemaking, outside interest groups (e.g., collections of businesses), Congress (e.g., through its various administrative agency oversight committees), and internal administrative agency bureaucrats are joined together – thus forming the 'iron triangle' – as key cogs in the rulemaking relationship (Duffy 2003). Most notably, this notion of rulemaking posits that internal agency bureaucratic actors are captive to the whims of Congressional actors and to the demands of external interest group actors; thus, developing regulations that largely reflect these outside actors' policy preferences (Bernstein 1955). Nevertheless, Heclo

(1977) and Golden (1998) have critiqued the 'iron triangle' approach to conceptualizing rulemaking as not being expansive enough in that other actors might be involved and that the relationship between the three posited actors in the triangle may not always be one denoted by bureaucratic captivation.

Similar approaches to conceiving of the rulemaking process invoke the importance of one or more political actors external to an administrative agency. For instance, numerous authors posit the primacy of Congress as the powerbroker in the rulemaking process (McCubbins and Schwartz 1984; McCubbins et al. 1987; Calvert et al. 1989; Huber et al. 2001; Moe 2012: 7). Although agency bureaucrats themselves physically write the rules, this literature argues that Congress exercises its power over rulemaking through its agency oversight functions (McCubbins and Schwartz 1984), the general provision or restriction of financial appropriations (Natow 2015: 372), the Senate's confirmation process of administrative agency leadership (Ketcham-Colwill 2014: 1640), and/or the issuance of limitation riders which forbid an agency from spending Congressionally-allocated funds on Congressionally-specified uses (MacDonald 2010). Conversely, other researchers have grappled with the idea that it is in fact the President who arguably has discretion over rulemaking, either through his or her position as ultimate head of the Executive Branch of the U.S. government under which the administrative agency is located (Sargentich 1993) or by virtue of the contemporary development of mandatory presidential suite-level review of codified rules and regulations (Ketcham-Colwill 2014; Pasachoff 2016; Haeder and Yackee 2018). Moreover, some authors have combined these two external political actors[38] to suggest that administrative agencies serve as agents to their Congressional and Presidential

[38] While not *per se* acting as a principal to the administrative agency, other literature notes the power of the Judiciary, with its judicial review authority of agency regulations (see Chapter 2), alongside that of the Congress and of the President. See, for example, McGarity (1992) and Balla (2015).

principals, and that rulemaking outcomes are controlled by these principals (McCubbins et al. 1987; Waterman and Meier 1998; Yackee 2003).

Those external agency actors not a part of the formal U.S. governmental system[39] likewise figure prominently into literature conceptualizing rulemaking. As referenced above through the notion of an 'iron triangle' of actors, outside interest groups – comprising business firms or entities representing the interests of businesses – are identified by many authors as critical actors in the development of administrative agency rules (Stigler 1971; Yackee and Yackee 2006; Wagner et al. 2011; Carpenter and Moss 2014). Individual business firms, such as a corporation commenting on a rule, can also serve as potentially vital actors in the rulemaking process. As will be discussed in greater detail in the next section, this is often hypothesized due to the presumed *privileged position* occupied by prospective business regulatees in the national economy (Lindblom 1977: 175) and/or because of these interests' ability to provide technical data, information, and other intellectual resources to the regulator in connection with the rules under construction (Wagner 2010; Weber 2012; McCarty 2014). In relation to this last point, non-industry actors, such as public interest groups and public advocacy coalitions (see below), have similarly been understood as entities capable of providing vital intellectual resources to regulators as well as facilitating exchanges of non-technical perspective relating to public sentiment on regulatory matters (Farina et al. 2012; Ziegler and Woolley 2016).

Importantly, these external, non-governmental actors typically have access – though not always on an equitable basis vis-à-vis business interests and non-business interests (Ziegler and Woolley 2016: 261) – to a range of venues through which to potentially affect regulatory development within the rulemaking process (West 2004; West

[39] Individual citizens, or members of the general public, can also be included in this class of actors (Farina et al. 2012).

2009). Such venues, or rulemaking-related events, include the pre-proposal stage of rulemaking (i.e., before a proposed rule is codified and promulgated), notice and comment periods during formal rulemaking, informal meetings with regulators, roundtable discussions, and conferences, to name a few. The significance of these regulatory events – particularly as it relates to the pre-proposal time period, the notice and comment sequence, and informal meetings – will be discussed at length in the subsequent section of this chapter.

As can be gleaned from the literature reviewed above, there exists extensive scholarship on the role that actors outside of an administrative agency play in rulemaking. Moreover, as can be inferred from the above review, much research either omits the significance of internal agency bureaucrats to the rulemaking process or, when their presence is mentioned, like in the 'iron triangle' conceptualization, relegates these internal actors to nothing more than the pawns of external actors. Nevertheless, actors internal to administrative agencies – such as chairpersons, commissioners, and other policymakers – can be significant players in rulemaking, and can exercise pivotal discretion and individual agency over this administrative process (Rourke 1969; Niskanen 1971). For example, as reviewed in Chapter 2, administrative agencies are delegated authority by both the Executive and Legislative branches of government to implement rules and regulations (Kerwin and Furlong 2011), and depending on the expansiveness of the authorizing legislation – which in the case of the Dodd-Frank Act resulted in abundant rulemaking discretion for the CFTC – this delegated authority, as exercised by agency policymakers, can be broad and impactful to rulemaking (Stone 2002; Kerwin and Furlong 2011). Such discretion can be exercised for specific and intentional purposes given that internal agency actors – like their external counterparts – possess their own policy preferences (Knott and Miller 1987; Potter and Shipan 2019) and that some have the capacity to set the agency's regulatory agenda (West and Raso 2013) as well as to determine the content of rules (Golden 1998).

The above review of literature emphasizing the place of actors – external and internal to an administrative agency – in a conception of rulemaking highlights the importance of considering a variety of actors when conceiving of (and analyzing) this administrative process; something that is not, however, consistently done across the spectrum of rulemaking literature, such as in the 'iron triangle' model. It is vital to note that scholarship definitively establishing which actors have the most sway in regulatory matters across the expanse of rulemaking process remains unsettled (Yackee 2003; Natow 2015: 362). As such, determinations for as much necessitate being concretely established on a case-by-case basis. This is particularly evident when determining actors' actual influence on rule content (i.e., linking specific actor speech acts, or other inputs, to the text of an enforceable regulation), which is at the core of regulations (Rashin 2020). Additionally, while actors undoubtably possess the capacity to influence regulatory formation, other critical non-actor-specific factors might also be significant to rulemaking and can, thus, be included in a conception thereof.

One such factor is the impact of ideational considerations, and more specifically, agency policymakers' beliefs regarding regulation (Gaventa 1980; Lukes 2005). For example, a chairperson of an administrative agency might articulate a regulatory vision for which he or she is deeply committed to advancing (e.g., the removal of certain regulatory requirements on a specific class of business actors who, in the chair's view, have been unnecessarily burdened), and through his or her endowed bureaucratic discretion as agency head, be able to achieve the advocated policy change. As noted in the literature on policymaker beliefs and rulemaking, beliefs can motivate policymakers to pursue particular rulemaking outcomes as well as efficacious regulatory relationships with other like-minded actors (Sabatier and Jenkins-Smith 1999; Lukes 2005; Sabatier and Weible 2007).

Another variable that can be considered when conceiving of the rulemaking process is that of context (e.g., institutional, social, economic, political). In such conceptions, changing contexts can impact actor actions, reconstitute regulatory relationships (internal and external to the administrative agency), and can prompt policy shifts (Sabatier 1986; Sabatier and Jenkins-Smith 1999). For instance, the recomposition of an agency's leadership, changes to the political party in control of Congress (Shapiro 2007), economic crises (Kerwin 2003; Kerwin and Furlong 2011), and alterations to institutional design (e.g., the creation of intra-agency rulemaking groups) (Terman 2012) are all contextual factors that might be relevant to an understanding of rulemaking.

A final factor that can be considered here, but one that is often overlooked in rulemaking literature, is that of agency history (Terman 2012: 16). While researchers have posited that administrative agencies develop identifiable behaviors (Senge 2006; Riley 2007), it is less clear as to what effect existing regulatory approaches – i.e., a developed pattern of regulatory action – might have on the formation or selection of new rule content. For instance, and as will be discussed in Part III of this thesis, extant agency precedent in one derivative domain can provide policymakers with informative content that can be used in the construction of new regulations in another derivative domain (e.g., applying futures-style regulations to newly regulatable swaps).

As has been reviewed in the literature covered in this subsection, rulemaking is a contested process that engages a range of an actors and factors across a variety of rulemaking events. Nevertheless, as has been shown above, not all conceptualizations of this administrative process incorporate the spectrum of actors discussed, and many omit potentially significant factors like ideational persuasions, contextual considerations, and agency history and regulatory precedent. Thus, when conceiving of OTC commodity derivative rulemaking, and when approaching the analysis of the construction of these financial instruments' regulation, it is essential to sample broadly on those actors and significant factors that influenced the creation of the codified rules.

Analyzing Rulemaking in the Literature

The character of approaches to analyzing rulemaking in the literature reflects the analytical focus of the inquiry. As noted directly above, there exist a plethora of potentially important actors and factors for which a rulemaking analysis could take into account. In this subsection, a succinct critical review of select approaches to the analysis of rulemaking is undertaken in order to provide preliminary efficacy to the Cultural Political Economy-based theoretical approach taken in this thesis.

The scholarship analyzing rulemaking employs a diverse set of analytical foci that range from rule content to broader public policy themes taken from non-rulemaking-specific literature. Micro-level approaches to analyzing rulemaking include those studies that examine the development of rule content (i.e., the text of administrative agency rules) in order to establish the influences (e.g., from regulatee comment letters) that conditioned the regulations' codification (Rashin 2020).[40] While such research analyzes the important core of rulemaking (i.e., the writing of regulations) and can provide linkage between the speech acts of outside interested parties (e.g., the written comments of prospective regulatees or public interest advocacy groups) and rule text – thus, empirically establishing

[40] Other studies in this same vein seek to examine the impact of the volume of comments on final rules (Balla 1998) as well as how stylistic changes to the language of final rules can be explained by expressed the 'regulatory sentiments' of commenting parties (Kirilenko et al. 2014).

the influence of these parties on the regulation's content – its narrow focus can fail to consider other variables important to rule construction, such as synchronicities in the ideational persuasions of key policymakers and regulated entities as well as more general contextual considerations. Drawing on literature from public policy, other approaches to rulemaking analysis utilize the researcher Kingdon's notion of 'multiple streams' (i.e., the convergence of problems, politics, and policy which give rise to 'windows' of opportunity to create new policies or rules – Kingdon 2003) as well as Kingdon's related conception of 'agenda setting' (i.e., how policy issues are incorporated into an administrative agency's implementation agenda – Kingdon 2003) to explain how rules develop (Kamieniecki 2006; Rinfret 2009). Although this approach can be used to account for a diverse set of factors – e.g., those actors or macroeconomic (contextual) factors affecting the 'politics' stream – that condition policymaking, such analyses may not include analysis of granular-level rule content and could, thus, benefit from the incorporation of additional analytical perspectives (e.g., the analysis of discourse or content analysis).

Also coming from the public policy literature is the Advocacy Coalition Framework (ACF) as a guide for examining policy processes (Sabatier 1988; Weible et al. 2011). While ACF will be further discussed in the next chapter, a brief synopsis of this framework is worth presenting here as it has been applied to rulemaking-specific research (Natow 2013). ACF provides a relatively expansive view of the policymaking process with its analytical focus being that of the meso-level 'policy subsystem', or the issue-specific domain in which groups of actors with similar beliefs seek to influence policymakers (who may or may not share these same beliefs and who, theoretically, may or may not be a part of these same groups) and, ultimately, policy outputs that reflect advocated for beliefs (Sabatier 1988; Weible et al. 2011: 351). As such, ACF incorporates several of the key considerations reviewed in the preceding subsection of this chapter, with its focus on 'advocacy coalitions' (i.e., groups of actors holding shared beliefs[41] who seek to impact policymaking), 'policy brokers' (e.g., high-level policymakers at an administrative agency), 'policy learning' (i.e., the acquisition and selective internal translation of new information) all operating as a part of a 'policy subsystem' (Sabatier 1998; Weible et al. 2009; Cairney 2012). Although ACF seeks to bring together multiple policymaking considerations – such as important actors and institutional factors – into a policymaking analysis (or, in this case, a rulemaking analysis), and in doing so can provide a detailed account of policy processes, it does suffer from a couple key limitations in specific relation to an analytical approach for rulemaking.

One such limitation is that actors involved in rulemaking – specifically, prospective regulatees - may not *per se* be bound together by shared beliefs, but rather by serendipitously converging economic interests, like multiple disparate business entities commenting in favor of exceptions to potentially costly derivative reporting regulations (Kim and Roh 2008). Thus, while beliefs are important, idiosyncratic interests of specific actors within a 'policy subsystem' can also be noteworthy (Kim and Roh 2008). Another limitation – which will serve as a partial launchpad for this project's Cultural Political Economy-based approach to OTC commodity derivative rulemaking – is that ACF's focus on a 'policy subsystem' with its advocacy coalitions (residing at the meso-level) might miss important policy process phenomena at the micro- and macro-levels (e.g., the speech acts of policymakers or prospective regulatees and matters of political economy as well as history, respectively) (Radaelli 1995; Kim and Roh 2008).

The central inference that can be drawn from the foregoing critical review of existing approaches to analyzing rulemaking is that, given the multitudinous actors and

[41] ACF distinguishes between four types of beliefs: (1) "deep core beliefs" which are virtually unmovable, (2) "policy core beliefs," (3) "policy core policy preferences," and (4) "secondary aspects" – with the latter three beliefs being potentially contestable and changeable (Leifeld 2013: 172f).

factors that might be of relevance in an understanding of the constructions of rules, an appropriate analytical approach for examining this administrative process must allow for myriad considerations to be contemplated. Moreover, such an approach must also explore considerations from the micro-level (e.g., rule content) through to the macro-level (e.g., broader political and economic variables). As will be discussed in the next chapter, meeting these standards is the primary benefit of the Cultural Political Economy approach employed in this thesis.

IMPORTANT CONSIDERATIONS TO THE CONSTRUCTION OF RULES: AT THE CFTC, DURING RULEMAKING IN GENERAL, AND BROADLY RELATING TO REGULATORY CAPTURE

Moving from a review of how the extant literature conceptualizes rulemaking and approaches the analysis of this administrative process, this section of Chapter 3 presents what the existing rulemaking literature has identified as important considerations, or factors, to the construction of rules at the CFTC, specifically, and in general across U.S. administrative agencies.

On Dodd-Frank Era OTC (Commodity) Derivative Rulemaking at the CFTC

In the wake of the crisis, U.S. financial regulators, under pressure from Congress and the citizenry alike, were compelled to collectively re-imagine and re-conceptualize their approaches to the regulation of financial markets (Carpenter 2010). Thus, the entrenched regulatory approaches of roughly four decades of financial regulation were rendered (at least) fluid and open to varying degrees of new inputs at multiple governmental levels (Underhill 2015; Carruthers 2013); with influences on the administrative agency process of rulemaking serving as key considerations to understanding the financial regulatory efforts and outcomes during the Dodd-Frank Act implementation period. Literature on over-the-counter derivative rulemaking at the CFTC after the enactment of Dodd-Frank can be segmented into two categories: research engaging the development of particular OTC derivative rules; and research engaging the organizational conditions specific to the Commission which can affect the rules that the agency puts in place. This subsection begins with an analysis of existing research on the Commission's development of specific OTC derivative rules. It should be noted that as Dodd-Frank era OTC rulemaking was only ostensibly completed in 2016 with the long-awaited codification of a final rule on position limits, literature engaging either the formation of specific OTC derivative rules, or the CFTC organizational conditions during the Dodd-Frank rulemaking era, remain relatively nascent fields of inquiry.

One central research article on Dodd-Frank era rulemaking in the domain of OTC derivatives — the first of the two categories just referenced — comes from Ziegler and Woolley (2016). In their study, the researchers examined two cases of Dodd-Frank financial reforms – the creation of the Financial Stability Oversight Council (FSOC), and the construction of (non-commodity-related) OTC derivative regulations at the CFTC. Through this they sought to elaborate on the matter of influences faced by Commission policymakers (Ziegler and Woolley 2016). The researchers based their analysis on three assumptions.

First, the acceptance by regulators of "deregulatory policy" in the three decades preceding the 2007/2008 financial crisis resulted in exposing financial firms to both increased competition associated with reduced barriers to entry, and entrenched arguments for "industry self-regulation" and of "free-market principles" (Ziegler and Woolley 2016: 251). Second, because of these reduced entry barriers, traditional notions of regulatory capture – to be discussed later in this chapter – were transformed into "a diffuse but pervasive sort of intellectual capture" (Ziegler and Woolley 2016: 251). This meant that financial firms (and those transacting derivatives) had to rely on *public acceptance* of their activities as being central to the functioning of the U.S. economy in order to exert influence over their regulation; rather than being able to influence their regulation simply through their *privileged position* (Lindblom 1977: 175) as a profit-generating cog in a capitalistic system. Thus, Ziegler and Woolley (2016: 251f) assert that financial firms' intellectual position to influence financial regulations was open to contestation by "policy entrepreneurs and activists" when the financial crisis struck. Third, in the post-enactment phase of Dodd-Frank, two distinct advocacy networks (coalitions) formed to influence administrative agency rulemaking in favor of either stringent regulations or continued self-regulation: the "stability alliance" and the "self-regulatory alliance," respectively (Ziegler and Woolley 2016: 252).

From these assertions, Ziegler and Woolley endeavor to analyze the roles that these advocacy networks had in the creation of the FSOC and the CFTC's development of OTC derivative rules. (Since this manuscript engages the regulation of OTC commodity derivatives, only the OTC case will be discussed.) The researchers juxtapose the existence of the stability alliance and the self-regulatory alliance with the notion of regulatory capture and business power. In doing so, Ziegler and Woolley examine the self-regulatory alliance's ability to minimize regulatory interference through the assertion of their economic position in the economy. Additionally, this juxtaposition allows for a critical assessment of the possible role of the stability alliance in both thwarting the self-regulatory alliance's influence and in shaping OTC derivative rules.

Through an analysis of rule comment letters, final rules, court cases, and policymaker interviews, Ziegler and Woolley arrive at a few conclusions regarding the influence of the stability alliance and the self-regulatory alliance on OTC derivative rulemaking at the CFTC. The main finding was the stability alliance's success in influencing Commission rulemaking towards its end of more stringent OTC derivative regulation (Ziegler and Woolley 2016: 272f). As the researchers note, this finding does not conform to the implications of traditional notions of regulatory capture, in that in spite of the stability alliance's lack of monetary resources and absent a structural position in the economy, it was, nonetheless, able to both curtail the influence of the self-regulatory alliance and provide extensive intellectual support to the rulemaking process (Ziegler and Woolley 2016: 261). Supporting this position, the researchers posited that in a rulemaking environment still under the specter of financial crisis, the ideational undergirding of the self-regulatory alliance was subject to contestation and effective counter-argument (Ziegler and Woolley 2016: 272). Further, insofar as the CFTC was mandated by Congress to codify rules bringing OTC derivative transactions under its purview – a marketplace of which the authors assert that the CFTC had limited knowledge – an opportunity existed for the stability alliance to provide the Commission with intellectual and legal resources[42] for purposes of fulfilling the agency's directive (Ziegler and Woolley 2016: 271f). In this specific case, a crisis-induced rupture in the ideational hegemony of the otherwise non-regulated, coupled with the need of the CFTC to develop regulations in (largely) unregulated markets, facilitated conditions in which the power and influence of key economic actors resulted in them playing second fiddle to the intellectual positions of a small, yet cohesive alliance of non-economic actors. Nonetheless, as alluded to in passing by Ziegler and Woolley (2016: 261f), these factors

[42] The notion that non-industry individuals or groups are able to influence rulemaking through their ability to leverage intellectual and legal resources reflects what Carstensen and Schmidt (2016: 323-326) refer to as "power through ideas." Originating in discursive institutionalist thought, "power through ideas" refers to the ability of individuals or groups to persuade policymakers to "accept and adopt their views" (Carstensen and Schmidt (2016: 323). Specific to the case described by Ziegler and Woolley (2016), in the terminology of Carstensen and Schmidt (2016: 324), the stability alliance can be understood to have made "cognitive arguments" that successfully defined problems that CFTC rulemaking sought to solve, provided the Commission with an adequate solution, and that were coherent with the CFTC's mission to regulate OTC derivative markets.

alone were not sufficient to ensure the success of the stability alliance, since it still remained critical that CFTC policymakers perceived regulatory change as warranted.

While Ziegler and Woolley's account of Dodd-Frank era OTC derivative rulemaking at the CFTC provides a pertinent analysis of the roles of ideas, expertise, advocacy coalitions, and "knowledge regimes" in influencing this regulatory process, a few criticisms are appropriate. First, Ziegler and Woolley's paper lacks a clear methodological approach. Aside from stating their analysis of rules, comment letters, court cases, and interviews, the means by which the authors arrive at their conclusions are largely anecdotal and speculative; lacking a robust framework from which to derive their findings. Second, the article fails to acknowledge the historical relationship that the CFTC had with OTC markets since the Commission's inception (see Chapter 6). This is important because, throughout the roughly four decades preceding the drafting of the Dodd-Frank era rules, the CFTC and other government organizations (e.g., the GAO) developed knowledge about OTC derivatives through their interactions with and studies of these instruments and their markets.[43]

Thus, to the third criticism. Specifically, given that the CFTC possessed, at least in general, knowledge of the functioning of OTC derivatives, the principal line of inquiry into why the CFTC developed the OTC derivative regulations it did should move beyond analyzing competing "knowledge regimes" to assessing the range of factors that conditioned CFTC policymakers' construction of a particular regulatory approach – such as the influence of an agency chairperson and his or her regulatory vision, and the impact of existing regulatory precedent. Fourth, and finally, it is possible that Ziegler and Woolley's

[43] See, as stated in Chapter 6, the CFTC's and GAO's analyses of Exempt Commercial Markets for OTC commodity derivatives: CFTC (2007) and GAO (2007).

findings might not be replicable over other, unexamined Dodd-Frank era CFTC rule-makings. (This point will be reexamined in this study's conclusion.)

Notwithstanding these critiques, this article does give prominence to the influence of ideas in OTC derivative market regulatory policymaking. Further, the work of Ziegler and Woolley provides an empirical example of the limits of theories of regulatory capture in explaining policy outcomes, while also serving as a solid basis for understanding ideational aspects of Dodd-Frank era OTC derivative market regulations. Additional research in this domain could benefit from a more detailed and critical exploration of the range of factors influencing policymakers' construction of regulatory approaches.

Emphasizing the perceptions of CFTC policymakers during Dodd-Frank rulemaking, another important article comes from Krug (2015). In short, Krug (2015) describes the intent behind agreeing to a financial transaction by developing two categories: investing and pretending. The former category, as Krug (2015: 1559) argues, explains the purpose behind securities (equities) transactions, while the latter category denotes the intended purpose behind a swap transaction. (It is worth pointing out that the author's definition of swap conforms to that used in Chapter 1 of this thesis, and not the statutory definition of a 'swap' adopted by the CFTC post-Dodd-Frank. Thus, for Krug (2015), options and other financial instruments containing a variable commitment are not included in the author's argument, even though they are subject to regulation as swaps by the CFTC – as discussed in-depth later in this paper.)

In the article's analysis of the CFTC's formulation of Dodd-Frank era rules regulating swap dealers, Krug (2015) uses the notion of "pretending" as the determinative perception held by Commission policymakers regarding the nature of a swap agreement. Policymakers treated swaps as if their intended purpose was rooted in "pretending"; thus, speculating on the value of an asset referent without purchasing or selling the asset, unlike with "investing" (Krug 2015: 1562). This, in turn, influenced how regulators at the CFTC drafted rules concerning swap dealers. The result being, as argued by Krug (2015: 1559), a pretense-based regulatory regime of swaps and swap dealers that burdens OTC derivative end-users and "excessively hinder[s] swap use." Krug (2015: 1610-13), concludes that for the Commission to achieve the Dodd-Frank Act's objectives, it must exchange its current perception of swaps as instruments of pretense which conceives of swaps as speculative, yet information-providing, financial instruments. Accepting the Commission's current pretense perception would seem to require only a regulatory regime of extensive information disclosure, like that associated with securities (equities) investing, in order to achieve the Act's objectives.

Two critiques of the Krug article can be presented. First, the author does not offer an account of the phenomena that may have led CFTC policymakers to formulate their perception of swaps as financial instruments of "pretending." The article, however, posits that swaps are self-evident instruments of "pretending," and, that as evidenced by the fact that the swap regulations did not conform to the intended spirit of the Dodd-Frank Act (Krug 2015: 1594ff), then CFTC policymakers must simply have been aware of the instrument's self-evident nature and viewed swaps accordingly. Second, the author fails to consider the implications of the statutory definition of a swap adopted by the CFTC – a definition that explicitly identifies variable commitments (optionality) in a derivative contract as being the hallmark of a swap.[44] Including a discussion of the CFTC's definition of

[44] For instance, see the CFTC's release entitled *Final Rules and Interpretations i) Further Defining "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; ii) Regarding "Mixed Swaps"; and iii) Governing Books and Records for "Security-Based Swap Agreements"* at page 5 for a discussion on the inclusion of optionality into swap determinations. Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/fd_factsheet_final.pdf. This notion of how the Commission determines the nature of a swap in the context of OTC commodity derivatives will be a focal point of later analysis and discussion in this thesis.

a swap could provide for a different conclusion regarding the primary lens (i.e., away from "pretending") through which Commission officials viewed their regulation of swaps (and, more generally, OTC derivatives). Finally, emphasizing the need for further research on the CFTC rulemaking following the passage of Dodd-Frank, Krug (2015: 1587) states that "virtually no attention" has been paid by academicians to the Commission's OTC derivative rulemaking.

Recently, however, the works of Helleiner (2018) and Pagliari (2018) have provided general insight into the CFTC's Dodd-Frank era rulemaking efforts. In Helleiner (2018), the author posits that through the Commission's crafting of its position limits rule, agency policymakers sought, among other things, to bolster "transparency and resilience" (i.e., the Dodd-Frank imaginary; see Chapter 4 and 6) of the marketplace for commodity derivatives. Furthermore, the author suggests that several important variables conditioning this rule were evident, such as "interest group mobilization," "historical norms," and agency precedent (Helleiner 2018: 220). Although the forthcoming analysis of OTC commodity derivative rulemaking does not investigate the formation of position limit regulations, Helleiner's remarks on the potential influence of these factors is worth bearing in-mind as these are relevant considerations for the instant study.

Regarding the Pagliari (2018) article, this author considers the political economy of Dodd-Frank Act rule implementation between 2010 and 2015. The central proposition advanced by Pagliari (2018) is that during the implementation of Dodd-Frank (i.e., the administrative agency rulemaking phase), some the Act's reforms, though not all, were "watered down" as a result of lobbying by various industry interests. Pagliari analyzes the 2010 through 2015 rulemaking period from a general perspective, and posits that across the rule-makings of both the CFTC and SEC, there existed "formal and informal coalitions" between financial (e.g., banks) and non-financial (e.g., major commodity companies, such as Cargill and Shell) actors that were, occasionally, successful in influencing the agencies' regulations in favor of these groups' business interests (Pagliari 2018: 163). While Pagliari's research complements some of the key themes found in the forthcoming analysis of OTC commodity derivative rulemaking, the researcher's study of Dodd-Frank rule implementation does suffer from a central flaw. Namely, Pagliari (2018) does not consider any factors, other than the influence of interest groups (and advocacy coalitions), that may have conditioned policymakers' rulemaking endeavors. Thus, potentially significant variables that affected the implementation of Dodd-Frank era rules were omitted in the author's research. With this in-mind, the study of OTC commodity derivative rulemaking conducted in this thesis does account for a variety of factors – beyond those discussed by Pagliari (2018) – which influenced CFTC policymakers' construction of OTC commodity derivative rules.

Moving to broader considerations on possible influences on CFTC policymakers' rule-making, a few items from the relevant literature are worth discussing. While produced by the notoriously anti-regulation think tank Mercatus Center, Peirce (2014) suggests that, among other things, during its Dodd-Frank era rulemaking, the CFTC experienced internal and external pressures to hastily write OTC derivative rules. Such pressures to pursue expeditious rule writing, as Peirce (2014: 61ff) argues, resulted in the Commission drafting and adopting incomplete or error-filled rules with policymakers operating under the assumption that these shortcomings would be corrected at a future date through the issuance of staff letters and agency interpretations and through further rulemaking.

Other literature, while not specific to rulemaking at the CFTC, provides insight into various aspects of the Commission as an organization. This research engages the second of the two categories of research alluded to in the opening paragraph of the current section of the instant study (i.e., organizational conditions that can affect rulemaking policy choices). For instance, in research examining the cultural differences between the CFTC and SEC, Im (2013) posits three organizationally-defining features of the CFTC: (1) a commitment to the soundness and promotion of competitive markets; (2) less emphasis on market participant information disclosure than its securities regulating counterpart; and (3) a professional culture dominated by economists which espouses economic empiricism in rulemaking and encourages competition within even regulated markets. As argued by Im (2013), these three features are functions of the historical context in which the CFTC was founded, the sophistication of futures and options market participants, a commitment—stemming from its economic-focused regulatory approach—to reducing costs, and the Commission's organizational structure. This account of the CFTC corroborates and expands on similar research by Markham (2009) and Muellerleile (2015), which loosely examine the Commission's culture by tracing historical, legal, and legislative developments pertinent to the agency. Although variations in such organizational culture can occur with the arrival of new, Presidentially-appointed leadership and their selected staff, accounting for cultural considerations can enrich research into administrative agency rulemaking by providing sociological context to an analysis.

On Administrative Agency Rulemaking

Turning to literature focusing on the myriad influences during, and inputs into, rulemaking processes generally, and not in the context of Dodd-Frank OTC commodity derivative rulemaking particularly, the extensive empirical work of Susan Webb Yackee, as well as research complementing this work, must be considered.

Findings from Yackee's research concerning influences on rulemaking processes covered herein can be segmented into three categories: (1) Congressional influence on rulemaking; (2) external stakeholder influence on rulemaking; and (3) influence attributed to rule comments.

With regard to the first category, Yackee and Yackee (2016) analyzed the frequency with which 17 U.S. administrative agencies, between 1947 and 1987, actually promulgated final rules in accordance with a statutory delegation enacted by Congress.[45] Their analysis found that final rules were promulgated 41% of the time when Congress delegated authority for rulemaking, and 63% of the time when Congress mandated that the administrative agency finalize a rule (Yackee and Yackee 2016: 395, 437). In explaining their findings, Yackee and Yackee (2016: 437-441) carefully suggest that while Congressional mandates matter when understanding if a rule is promulgated, the agency's responsiveness to the policy preference of the then-extant Congress (and not the delegating Congress) may be pivotal in determining promulgation. The notion of an administrative agency being responsive to the policy preferences of a contemporaneous Congress has also been put forth in the works of Moe (1985), Ferejohn and Shipan (1989), Scholz (1991), and Shipan (2004).[46] Concerning the quantitative research of Shipan (2004: 478), this author goes beyond the suggestion of Yackee and Yackee (2016) to posit that under certain circumstances (e.g., the left or right political-ideological composition of Congressional committees), agencies do indeed respond to Congressional preferences – such as an agency

[45] The study extended the timeframe for dataset to 1990 for administrative agency rules only (i.e., if a statute was by Congress in 1987 and resulted in rulemaking in 1990, then it was included) (Yackee and Yackee 2016: 412f).

[46] Other quantitative research, such as that of Carpenter (1996) on the influence of, among other variables, the Congress, has, however, yielded mixed results concerning Congressional influence on administrative agency decisions. As noted by Shipan (2004: 468), the central problem with the research of, for instance, Carpenter (1996), is that such studies lack a detailed examination of the conditions "under which Congress might matter."

becoming less activist in its rulemaking as its Congressional oversight committee takes on a more conservative political persuasion.

Along a similar line of inquiry, Yackee and Yackee (2009) examined the impact of a divided government[47] on the output of administrative agency rules. By analyzing those proposed and final rules with a concomitant Notice of Proposed Rulemaking in the U.S. *Unified Agenda of Regulatory and Deregulatory Activities* dataset between 1983 – 2005, and 1985 – 2005, respectively, Yackee and Yackee (2009: 140f) found that during periods of divided government, administrative agencies are – by a statistically significant margin – less likely to promulgate proposed and final rules, than during periods marked by single-party government. Thus, administrative agency policymakers are "less willing and less able to change the regulatory status quo" and engage in legally binding rulemaking when differing political parties control different elected federal institutions (Yackee and Yackee 2009: 140).

As it pertains to external stakeholder influence on rulemaking, Yackee (2011: 386) posits that during the pre-proposal stage of rulemaking – in this case, before a Notice of Proposed Rulemaking is issued – interests groups can favorably affect the policy content of the to-be-proposed rule through *ex parte* (informal, off-the-record) contacts with administrative agency policymakers. Further findings from this research on the pre-proposal period of rulemaking reveal that "informal participants" can provide "technical and political information" to policymakers at a higher rate than those not informally lobbying when rulemaking is inchoate, and that *ex parte* lobbying can provide interest groups with opportunities to successfully engage in regulatory "agenda setting" and, to a larger degree, "agenda blocking" at this early stage (Yackee 2011: 387ff). The implications

[47] Defined as when "a different political party controls one of both houses of Congress and the presidency" (Yackee and Yackee 2009: 133). For an overview of the potential impacts of presidential power alone on administrative agency rulemaking, see Bruff (1979).

of these findings being that in certain cases, the early-stage influence of external stakeholders through informal means can have iterative effects throughout the entirety of the rulemaking process.[48] Moreover, Yackee's study represents an exploration of what West (2009) terms the "black box" of rulemaking (i.e., the pre-proposal stage). As such, Yackee (2011) contributes to the notably under-researched area of factors conditioning the development and the content of an agency's advance notices of proposed rulemaking and its proposed rules.

Other research done by Yackee, which explores interest group competition and lobbying coalitions, likewise provides critical insights into the influence of external stakeholders on rulemaking. For example, in assessing the influence of competing interest groups on the content of final rules promulgated by an administrative agency, McKay and Yackee (2007: 349f) find that while a greater volume of comments by an interest group's side of a regulatory issue influences – in that side's favor – the content of the final rule, opposing sides seem not to compete, as evidence of counteractive comment and response is lacking. While this study admittedly requires an "expanded time horizon" to "yield better generalizability of the results," its support of the notion that policymakers respond positively to interest groups on the dominant side of commenting is important to keep in-mind and to assess when examining OTC commodity derivative rulemaking. Additional work studying lobbying coalitions – i.e., coordinated interest groups advancing a shared agenda – points to favorable outcomes (whether advancing preferred policies and agendas or thwarting unwanted policies and agendas) for coalitions engaged in influencing pre-proposal agenda setting and final rules through comment submissions (Nelson and Yackee 2012: 351). Moreover, Nelson and Yackee (2012: 351) establish that consensus around

[48] Similar findings can be found in Kerwin (2003) and West (2004).

coalition messaging and increased coalition size are important determinants of the effectiveness of coalition lobbying on rulemaking.

Finally, Yackee and Yackee (2006) analyze the influence of business on rulemaking by tracing changes between proposed rules and final rules through an analysis of 40 rules from four administrative agencies between 1994 and 2001. The researchers' findings suggest that through formal commenting, business can influence agencies into altering final rules to "suit the[ir] expressed desires" (Yackee and Yackee 2006: 135). Furthermore, this study found that for the analyzed dataset, business gained an even greater influence over changes to proposed rules when it provided a high proportion (90%) of total comments (Yackee and Yackee 2006: 136). Nevertheless, as noted by Yackee and Yackee (2006: 137) in their concluding remarks, their findings leave open the possibility that well-formed counter-industry groups that actively comment after a rule has been proposed could mitigate business influence. Additionally, Yackee and Yackee (2006: 136f) suggest that their findings do not support the claim that business commenters more adequately communicate "information or expertise" than do other commenters; thus, making it unlikely that "business expertise" is responsible for this group's dominant influence on changes to the content of final rules.

In regard to the specific influence of rule comments on rulemaking outcomes, findings from three studies are worth noting. First, in Yackee's 2009 collaborative study on the influence of commenters during "agency rule development," it was concluded that for rules originating with an Advance Notice of Proposed Rulemaking, commenters – especially those comprising a cohesive interest group – were able to influence rule content in their favor and/or thwart unwanted, nascent regulations (Naughton and Schmid, et al. 2009: 274). Similarly, although not in relation to early-stage rulemaking, in analyzing 40 rules from

4 federal agencies between 1994 – 2001, Yackee (2006a) determined that administrative agency policymakers largely respond positively to the comments of interest groups by altering final rules to reflect the regulatory changes proposed by these groups. Finally, in assessing the influence of interest group comments on the content of final rules under conditions of both Presidential and Congressional attention,[49] Yackee (2006b) again confirmed that interest group comments can influence the content of final rules in their favor. Nevertheless, Yackee (2006b: 742) stipulated that this holds true only when Presidential and Congressional attention on rulemaking is low, and that in cases where only Congress is attentive to rulemaking, such attention can reduce the influence of interest group comments on agency regulations.

The findings of Yackee's research offer important insights into the focus of this current paper's research – OTC commodity derivative rulemaking at the CFTC during the Dodd-Frank era. Of these insights, the most salient is that rule commenting matters and can affect – under certain conditions more than others – the content of the final rules codified and promulgated by an administrative agency. Thus, in analyzing rulemaking, it is essential to engage with interested party comments and policymaker responses thereto.

While Yackee's research provides empirical evidence of influences on rulemaking, it does suffer from a few limitations that could prevent the corpus of her work from being generalizable to this paper's case study. These include: (1) a lack of data from financial regulatory rulemaking; (2) the sourcing of data from non-significant, low salience rules[50];

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[49] Presidential attention being defined as a function of whether the Office of Management and Budget believed the rulemaking to be significant *and* the preference of the President for regulation (Yackee 2006b: 736f). Congressional attention being defined as a function of (1) whether Congress required the agency to engage in rulemaking, (2) whether a Congressional committee held a hearing regarding the rule, (3) whether Congress gave a deadline for the completion of rulemaking, and (4) whether Congresspersons submitted a comment during rulemaking (Yackee 2006b: 735f).
[50] Yackee states as much in each study; see, for instance, Yackee (2006a: 118f).

and (3) no studies analyzing rulemaking data from the post-financial crisis period. Furthermore, Yackee's analyses of rulemaking are predominantly quantitative in nature. Although this renders such analyses sensitive to textual coding errors, missed linguistic nuance in rule comments, and the possibility of limited generalizability of specific results, it also means that the work on quantitative rulemaking research could be advanced through the addition of detailed qualitative studies, and that any qualitative rulemaking research can be complemented by considerations derived from existing quantitative work. As indicated in Yackee (2019), the author is cognizant of the need to also examine rulemaking from a qualitative perspective in order for research in this field to explore the minutiae and complexities of rulemaking. Examples of often overlooked subtleties include the ideological persuasion of an agency's chairperson, the role of expressed regulatory visions and missions of an agency's head in impacting rulemaking, and an agency's use of interpretive guidance, and other documentary genres, in lieu of a rule (Yackee 2019).

To this point, it should be noted that scholarship on the influence of an agency's chairperson on rulemaking – whether it be the initiation of rulemaking or the character and content of codified regulations – is limited (Moe 1982; Ho 2010). Given that, as discussed in the first section of this chapter, administrative agencies often possess bureaucratic discretion over rulemaking, and that their policymakers have latitude in determining the content of rules, assessing the role of an agency's chair in guiding rulemaking efforts could fill an important gap in the rulemaking literature.[51] This is particularly relevant as whomever is in the position of chair at an independent administrative agency controls that agency's agenda and ostensibly has influence over its regulatory outputs (Datla and Revesz 2013: 818).

[51] This could be especially true for those situations in which the chair exercises discretion over on-going rulemaking, such as during periods of revisions to existing rules (West and Raso 2013: 506f).

On Capture Theories

This final subsection briefly covers capture theories—the third of the three research categories referenced earlier in this chapter. In short, capture theories seek to explain why or how regulations were created and took the form they did. As the predominant notion of capture – 'regulatory capture' – originated with George Stigler's "The Theory of Economic Regulation,"[52] this subsection will begin with an examination thereof. Other capture theories will also be presented, with each successive theory modifying the preceding generation. Concluding this subsection will be a critical discussion of one of the latest capture theories, and one which closely relates to financial regulation – 'knowledge capture'.

At its core, regulatory capture seeks to explain why government regulation of private enterprise occurs (Stigler 1971). In "The Theory of Economic Regulation," Stigler posits that often, regulation is sought by private enterprise – thus, supplied by the government – and that such regulation is "designed and operated primarily" for the benefit of the regulatee (Stigler 1971: 3). Although this position may seem counterintuitive given the usually vociferous opposition by industry to regulation – with the protracted non-regulation of OTC derivatives being a prime example (see Chapter 6) – Stigler's claim is best viewed from the angle of industry protection: firms seek regulation to protect their profitable activities from competition, but do not want (increased) regulation of their profitable activities. Additionally, regulatory capture holds that policymakers are utility maximizers – thus, not acting in the public interest. And that, through the supply of political

[52] According to Posner (2014), the study of regulatory capture has its origins in Marver Bernstein's 1955 book entitled, "Regulating Business by Independent Commission." This work, as Posner (2014: 51f) notes, approached regulatory capture from a political perspective, not an economic one as in Stigler's work.

patronage to the politically motivated and self-interested policymakers, in return, regulated industry attains the rewards (regulation) which it has sought (Stigler 1971). Simply put, the theory of regulatory capture holds that regulators are often beholden to the interests of the regulatee (Carrigan and Coglianese 2016: 2f; Pan 2012; Gowlan 1990).

As noted earlier, the theory of regulatory capture is rooted in an economic argument for regulation – one based on supply and demand between self-interested actors. While the term's progenitor defined regulatory capture with the regulatee's desire for profit-protecting regulation in-mind (Stigler 1971), historically, the term has been used to refer to occasions in which the regulatee subverts the regulatory endeavors of the regulator (Posner 2014: 49) through an exercise of regulatee's structural[53] (Tienhaara 2013: 166) and instrumental[54] (Culpepper and Reinke 2014: 428) power. (Refinements to the notion of structural power have been made in the literature on business influence on rulemaking. For instance, Young (2015) posits that regulators may respond positively to "structural prominence" – i.e., the standing of a business in an economy as measured by its assets, total number of employees, etc. – in that "structurally prominent" firms may receive more desired regulatory concessions from regulators than their less "structurally prominent" counterparts.)

Although a surfeit of literature on regulatory capture exists, the theory is subject to numerous critiques. First, in its originally defined sense, regulatory capture fails to account for industry preference for both non-regulation and deregulation.[55] Second, the characterization of policymakers as simple utility maximizers underestimates the complexity of their being. Research from Perry and Wise (1990) and Perry et al. (2010)

[53] Derived from a firm's position within an economy.
[54] Relational power stemming from activities such as lobbying, political donations, or future private-sector job opportunities.
[55] In explaining private enterprises' desire for less regulation, see Carpenter (2014).

suggest that a confluence of factors, including myriad motivations and a sense of ethics, among others, can be present in the being of the policymaker; not singly the influence of rational utility maximizing. Third, the theory of regulatory capture does not consider the possibility that non-regulatee advocacy groups may overcome regulatee influence and, thus, shape administrative agency regulations, as evidenced by some of the rulemaking research highlighted in the preceding subsections.

While this is not an exhaustive list of critiques to the traditional conception of regulatory capture, it evidences its shortcomings and provides a springboard to exploring other capture theories which have both expounded and modified this original understanding of regulation. One such capture theory is ‘cultural capture.’ Proposed by Kwak (2014), cultural capture suggests that there are factors beyond rational self-interest which serve to influence the regulator-regulatee dynamic. For instance, Kwak (2014: 80) states that shared identity, similar socioeconomic and intellectual status, and mutual relationships with the regulatees are factors influencing “regulators’ beliefs and actions.”[56] Through a sense of shared identity, regulators may craft rules to satisfy the demands of those they “perceive as being in their in-group”; e.g., the revolving door between banking and financial regulatory agencies making membership in one of the sectors indistinguishable from the other (Kwak 2014: 80, 83). Additionally, when a regulator perceives the regulatee as having similar or greater “social, economic, [and/or] intellectual” status, the regulator may accede to the regulatory position advanced by the regulatee as a way of signaling or improving its own status (Kwak 2014: 80, 86-89). Finally, a regulatee

[56] In Kwak (2014), the notion of cultural capture does not grant the regulatee exclusive claim to the three sources of potential influence. Non-industry stakeholders could likewise benefit from shared identity, similar socioeconomic and intellectual status, and mutual relationships with regulators.

that is a member of a regulator's social network increases the likelihood that its position is advanced by its regulator (Kwak 2014: 80, 91-93).

Other capture theories pertinent to the development of financial regulation include 'information capture' and 'complexity capture.' In moving beyond the economic rationale for capture, as espoused by Stigler, information capture is grounded in the process of administrative rulemaking and seeks to explain how regulation is developed under conditions of increasing information costs (Wagner 2010). In short, information capture contends that regulators can become captured – even unintentionally – by external stakeholders because the rulemaking requirement for public comment (1) increases information costs for regulators having to assess the comments, which results in (2) regulators seeking to constrain information costs by giving deference to those comments providing the agency with the highest degree of informational resources for rule development (Wagner 2010). Complexity capture advances the centrality of information to rulemaking as found in information capture, but situates financial regulatory rulemaking in increasingly complex financial markets (Weber 2012). The central proposition of complexity capture is that in this increasingly complex domain, financial regulators face an enlarging epistemic gap between "what they are able to know and what they need to know" (Weber 2012: 644f) to effectively regulate. Thus, according to McCarty (2014), regulators defer to the expertise of financial firms – whether it be through the revolving employment door or through rule comments, among others – when formulating regulation under conditions of complexity. The result being industry-captured financial regulators.

Each of these three modifications to the basic notion of regulatory capture provide important insight into possible influences on policymakers at administrative agencies. Aside from noteworthy insights, these capture theories move beyond explaining why regulation happens – as in "The Theory of Economic Regulation" – to analyzing what influences on rulemaking exist and how these affect regulatory outcomes. The final capture theory to be discussed – 'knowledge capture' – continues this analytical trend and draws heavily on information and complexity capture to propose an updated, Dodd-Frank era notion of financial regulatory capture.

The premise of 'knowledge capture' is that contemporary financial regulation seeks to regulate increasingly complex[57] financial markets and, thus, necessitates that regulators have access to data, information, and knowledge about these increasingly complex markets in order to regulate effectively (Becker 2016).[58] Emphasizing the role of knowledge and expertise, knowledge capture argues that because financial markets complexify, an asymmetry opens between the regulator's knowledge of the financial market and the market's actual workings (Becker 2016: 240). To bridge this chasm, regulators "turn to their regulatees" to solicit relevant data, information, and expertise; thus, establishing a relationship of dependency with the regulatee (Becker 2016: 239f). As Becker (2016: 231-234, 240) indicates, this relationship is reinforced by policymaker bounded rationality,[59] the

[57] Becker (2016: 67), in citing Weber (2012), defines 'complexity' as being distinct from 'complicated' in that that which is complex entails (1) non-linear, reciprocal, and unpredictable interactions between objects, (2) the potential for small perturbations to the object producing significant effects and large perturbations producing no effects, and (3) the existence of a simultaneous state of robustness and fragility (i.e., the complex object appears stable and robust to most internal and external changes, but can nonetheless breakdown as a result of endogenous or exogenous factors). Moreover, as Becker (2016: 67) notes, that which is complex exhibits interconnectedness with other objects. In regards to the complexity of the contemporary financial system, Becker (2016: 66) distinguishes between three levels of financial complexity: systemic complexity, organizational complexity, and financial product complexity. Each of these levels exhibit the same fundamental traits of complexity, but at different sites and scales.

[58] Citing the work of Becker and Willke (2013), Becker (2016: 163) defines 'data' as the "observed differences about that state of the world surrounding us." Furthermore, Becker (2016: 163) contends that data is the fundamental unit from which information is created. 'Information,' according to Becker (2016: 164), is the (largely) subjectively determined message (whether linguistic or otherwise) drawn from data. Information represents data in its useable form. Finally, as posited by Becker (2016: 164f), 'knowledge' denotes purely subjective know-how and, generally, flows from experience and practice in connection with the knowledge object.

[59] Simply, 'bounded rationality' is the limited capacity of a human being to process information (Becker 2016: 183). This notion originates in the work of Simon (1955) and rests on fours

absence of non-industry expertise, and – similar to the position of Wagner (2010) – the nature of the rulemaking process. Additionally, Becker (2016: 236-239) proposes that knowledge capture is cyclical: regulator reliance on regulatee expertise is high during periods of financial stability and at the initial point of financial crisis, but recedes as public and political awareness of the crisis increases, only to return to its pre-crisis level once public attention fades and financial regulatory rulemaking becomes technical and specialized.

Notwithstanding its applicability to studies of financial regulation at administrative agencies, and its seeming fit as a theoretical framework to the empirical examination undertaken by Ziegler and Woolley (2016) (see the first subsection above), a few critiques of knowledge capture can be levied. First, knowledge capture lacks robust empirical underpinning (Becker 2016: 253). Although Ziegler and Woolley seemingly provide the beginnings of empirical work on knowledge capture, this capture theory has neither been operationalized as an analytical toolkit nor empirically tested or supported.

Second, the definition of 'knowledge' utilized by Becker (2016) is contestable, with any contestation related thereto having iterative effects on the author's main argument. Specifically, Becker (2016: 190), in drawing upon Millo and MacKenzie (2009), argues that the financial system produces its own facts, with the veracity of any statement about the financial system being determined self-referentially or from its "relevancy and usefulness for particular groups." While financial regulators and industry participants may act *as if* they have knowledge of the financial system (or, their specific domain within the financial system), as will be explored in the subsequent chapter, objects to which knowledge refer

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assumptions stated by Becker (2016: 200): No being has the capacity to (1) attach "definite pay-offs to outcome decisions," (2) specify "the nature of these outcomes," (3) bring "the pay-offs into a consistent order," and (4) define "the probabilities of the respective outcomes."

neither express the full extent of their capacity nor are defined by the expression of their capacities alone.[60] Thus, positing that “facts” are produced by a system whose ontological state[61] is denoted by inherent withdrawal of its full range of capacities results in the veracity of these “facts” being contingent on the temporal state of the system, and negates claims to truthfulness as the state of the system changes. Although Becker (2016: 239f) appears aware of the constraints to knowledge that complexity imposes on both market participants and regulators, the notion of knowledge capture could be advanced and improved by an inclusion of ontological considerations, such as those from realist ontologies (e.g., Assemblage Theory and Object-oriented Ontology).

Flowing from the second criticism of the notion of ‘knowledge capture’, the third pertains to the perception of policymakers that financial industry participants (or other interest groups) have veritable expertise in the domains sought to be regulated. Becker (2016: 232) explicitly states that knowledge capture does not “depend on a specific perception of the public servant,” when it indeed does – the perception that external stakeholders possess requisite knowledge and expertise. Exploring why policymakers perceive that these stakeholders possess such expert knowledge, given that their claim to knowledge is contestable, would be useful in refining this version of capture theory.

FINAL REMARKS

This chapter has critically reviewed scholarship on the administrative agency process of rulemaking – the academic literature in which this research project on OTC commodity

[60] This assertion derives from realist ontology and is central to the ontological position taken in the subsequent chapter. Although it will be discussed in greater detail then, for further consideration of this notion, see Sum and Jessop (2013: 3-6), Harman (2016a), Harman (2016b), DeLanda (2016), and DeLanda and Harman (2017).

[61] It is important to note that nowhere in Becker (2016) is an exploration of ontology undertaken. Rather, the author’s argument is generated from epistemological propositions.

derivative rulemaking is situated and to which it can contribute. In doing so, it has examined important conditions and factors that previous research into rulemaking have considered to be formative when assessing the construction of administrative agency rules. As such, the above review forms the basis for the selection of the multifaceted Cultural Political Economy approach for examining CFTC OTC commodity derivative rulemaking between 2010 and 2016.

There are two key takeaways from this chapter as it relates to this study into OTC commodity derivative rulemaking and its contribution to the wider scholarship on this administrative agency process. The first is that there is a gap in the literature on CFTC Dodd-Frank era rulemaking concerning the formulation of OTC commodity derivative regulations, and, specifically, how the Commission defined ‘swaps’ (i.e., derivative instruments which were to be regulated) in the context of the commodity derivatives marketplace. Although Pagliari (2018) provides some preliminary commentary on the potential influence of businesses on OTC commodity derivative rulemaking at the CFTC, the topical domain of OTC commodity derivative rulemaking remains largely unresearched, and, given the rulemaking’s high salience to industry (as, at their most stringent construction, these OTC commodity derivative rules would have affected countless firms involved in the sale and/or purchase of myriad everyday energy and metal commodities), it deserves further inquiry. The second point is that research on OTC commodity derivative rulemaking at the CFTC provides the extant literature on general administrative agency rulemaking with a valuable contribution. This is the case because this research contributes a qualitative, longitudinal study that highlights how sets of regulations were constructed and why they evolved over a period of time, and, therefore, includes an assessment of those varied, yet significant factors – such as the under-researched area of agency chairperson influence – that conditioned rulemaking; thus, further developing knowledge of this administrative process.

Chapter 4 – Theoretical Framework for the Analysis of OTC Commodity Derivative Rulemaking

INTRODUCTION

The foregoing chapters have established definitional and administrative considerations necessary to embarking on an analysis of OTC commodity derivative rulemaking at the CFTC. Moreover, existing literature engaging both CFTC rulemaking specifically, and administrative rulemaking generally, has been presented in order to situate the analysis in its research domain. Having done this, the current chapter will establish the theoretical framework upon which this project's analysis is based. To reiterate, the analysis answers the question of *how CFTC policymakers constructed the regulation of OTC commodity derivatives between 2010 and 2016*. Answering this question necessitates the use of a multipronged analytical approach to rulemaking that can identify and assess those factors that conditioned the regulations' construction.

Before discussing the choice of such an analytical framework, it is worth briefly returning to the reviewed literature of the last chapter and its implications for this selective decision. As indicated in Chapter 3, rulemaking is a contested process that can be populated by diverse actors and be additionally influenced by a range of other factors. Thus, any approach to the analysis of this administrative process must take into consideration a range of items that are relevant to the researched case. Some existing approaches attempt to do this – such as the ACF – but, as previously noted, they are subject to important limitations. To move beyond the limitations presented in the preceding chapter, what is needed to analyze OTC commodity derivative rulemaking is a multifaceted approach whose analytical lenses can be applied from the micro- to macro-level, and, as such, an approach that includes room for the exploration of the textual creation of rule content (i.e., the semiotic) through to assessments of material factors and other contextual matters (i.e., the extra semiotic) that influenced the regulations' development.

Given all this, the instant thesis utilizes Cultural Political Economy (CPE) as the theoretical framework for the analysis of the construction of OTC commodity derivative regulations. Although a relatively recent contribution to the realm of political economy, CPE is increasingly being used to inform research ranging from the privatization of educational systems (Verger et al. 2017), to the study of geopolitics (Jessop and Sum 2018), to conceptions of and policy response to financial crises (Sum and Jessop 2013). Choosing CPE to inform the analysis of OTC commodity derivative rulemaking was done because (1) its analytical lenses (i.e., semiosis and structuration – see below) allow for an exploration of a multiplicity of influences on rule development (including, where applicable, those highlighted in the above reviewed literature), (2) it goes beyond the ACF, among other previously reviewed approaches, in that its analytical lenses facilitate a coherent analysis that can engage with micro-level considerations (e.g., the articulated regulatory vision of CFTC leadership) through to those at the macro-level (e.g., historical considerations as well as contextual matters of political economy and relating to an 'imaginary' – see below), and (3) its efficacy in structuring an analysis of rule construction (i.e., one utilizing rule content as the analytical entry-point before moving onto an assessment of those semiotic and extra-semiotic influences that interacted and co-evolved to condition this regulatory text, or regulation).

Through the application of CPE to this research project, the theoretical framework can itself be advanced while allowing for a contribution to current understandings of OTC commodity derivative rulemaking at the Commission, specifically, and administrative agency rulemaking, broadly. To the former, the use of CPE as a theory supporting an analysis of rulemaking advances the framework into an applicable domain left untouched by current CPE-based literature – that of administrative agency rulemaking. And, to the latter, exploring this administrative process from a CPE perspective can both complement existing rulemaking literature and provide for a more nuanced understanding of rulemaking stemming from the theoretical framework's micro through macro analytical approach, its introduction of guiding (policy) 'imaginaries' into this area of administrative agency scholarship, as well as the emphasis that it places on the interaction and co-evolution of semiotic (discursive) and extra-semiotic (material and other contextual) factors as the driving force conditioning regulatory formation.

To set forth Cultural Political Economy as the theoretical framework for this project, this chapter comprises three sections before concluding with a few final remarks. The first section provides a general overview of CPE, the theory's basic ontological and epistemological foundations, and its situation in relation to other potential theoretical approaches to rulemaking (e.g., the ACF). Among other things, this section provides the requisite CPE-related vocabulary necessary to engage extant CPE literature, and to comprehensively formulate the CPE approach to be utilized in this research endeavor. In the second section, existing CPE literature will be reviewed with a focus on how the theory has been used and from whence criticisms of its application have arisen. The third, and final section of this chapter is composed of a detailed and critical presentation of the CPE approach in the context of OTC commodity derivative rulemaking.

A GENERAL OVERVIEW OF CULTURAL POLITICAL ECONOMY

Developed by Ngai-Ling Sum and Bob Jessop, CPE differentiates itself from other approaches to political economy – including similar critical approaches to the field – through its focus on the "semiotic dimensions of political economy" (Sum and Jessop 2013:

viii). While the terms ‘semiotic’, and its nominative counterpart, ‘semiosis’, will be discussed in greater detail below, these terms denote the process of sense- and meaning-making (Sum and Jessop 2013: viii). The inclusion of the semiotic dimension of inquiry aims to support the theory’s position that it represents a “cultural turn” in the study of political economy (Jessop and Oosterlynck 2008: 1155). This means that CPE pays serious attention to the process of intersubjective meaning-making in influencing “economic and political conduct” (Jessop and Oosterlynck 2008: 1156). Moreover, in moving beyond the theory’s initial intellectual inspirations – the Regulation Schools of thought,[62] Gramscian thought,[63] and various forms of discourse-linguistic analyses[64] (Belfrage and Hauf 2017; Belfrage and Hauf 2015) – CPE seeks to integrate into its analytical framework the pivotal co-evolution of semiotic and ‘extra-semiotic’ factors and processes; thus ensuring that it accounts for both discursive and ‘material’ considerations (Jessop and Oosterlynck 2008: 1156). The “cultural turn” notwithstanding, as indicated by Sum and Jessop (2013: 21f), at its foundational level, CPE rests, both analytically and ontologically, in a “complexity turn” – one privileging the complex nature of things and emphasizing the primacy of complexity reduction in both the apprehension of phenomena, and as a basis for acting. To elaborate on these and others

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[62] The approaches to political economy espoused by these Schools advance, as Sum and Jessop (2013: 81) note, the argument that the “institutional separation” – i.e., the structural influence of one on the other – that exists between the economic and political spheres changes at different points in time and is constructed as based on, and mediated in and through, conceptions of economic and political systems. Thus, “ideas, beliefs, and legitimization” are incorporated into the study of political economy (Sum and Jessop 2013: 72). For a description of the influence of the Regulation Schools on the development of CPE, see Sum and Jessop (2013: 80-87).

[63] While Sum and Jessop (2013: 72) claim that Antonio Gramsci was a “proto-cultural political economist,” his intellectual contributions were made in the early-20th century. From these contributions, Sum and Jessop (2013: 73) highlight Gramsci’s notion of the “historic specificity” of economic relations – as expressed by naturalized yet contingent social relations, collective thought, and the articulation thereof, etc. – is what conditions an economic system. Thus, an economic system and its relations cannot be understood to be a transcendental universal maxim, but is subject to variegation through social contestation. See Sum and Jessop (2013: 72-76) for an exploration of Gramsci’s influence on CPE.

[64] See Sum and Jessop (2013: 96-144) for a complete overview of both the semiotic analytical foundations of CPE and for those discourse analytical frameworks that are compatible with the CPE research program.

concepts central to CPE, the following pages first explore complexity reduction and the processes through which CPE posits that human beings both 'go on' in the world – semiosis and structuration – and that undergird the construction of 'imaginaries', before then discussing CPE's ontological and epistemological assumptions.

CPE: The Basics

In its original formulation, CPE espoused that the 'world' and its concomitant processes and phenomena are too complex to be wholly grasped (apprehended) (Sum and Jessop 2013: 3). Take for example the phenomenon of a boat sailing on a large river. To an observer acquainted with humankind's ability to engineer and operate boats, this phenomenon may appear routine. Nevertheless, this appearance belies the complexity of this occurrence. For instance, does the observer perceive the manifold properties of the material comprising the boat's hull allowing, in part, for its capacity to remain buoyant? Moreover, does the observer apprehend the capacities of both the boat (and its crew) and the river to produce an outcome other than what the person is currently witnessing? While this is not an exhaustive list of questions, both examples reveal that apprehending the totality of this phenomenon is necessarily limited.[65]

Stemming from the overriding complexity of things, CPE posits that human beings must find a way to navigate this complexity to "go on" in a world that cannot be completely understood. Thus, CPE maintains that individuals engage in complexity reduction, but not complexity mastery (Sum and Jessop 2013: 3, 21). This process of complexity reduction, as understood by CPE, is made manifest through two processes: semiosis and structuration.

[65] The notion that the observer's apprehension of a phenomenon is incomplete can be developed from two angles: resulting from the nature of the observer and resulting from the nature of the observed object. CPE maintains that both are responsible for limits to apprehension (Sum and Jessop 2013: 3).

Through the active employment of semiosis and structuration, individuals bring structure to otherwise unstructured complexity, and meaning to what otherwise might seem chaotic and meaningless (Jessop 2010: 338). In the context of the above boat example, these two processes involved in complexity reduction – especially in their combined terminal form as a sedimented 'imaginary' – would allow the observer the comfort of assuming boats sail without being bogged down by the complex and emergent processes allowing for sailing (or that appear absent in the phenomenon).

As explained by CPE, the process of complexity reduction through semiosis is one of sense- and meaning-making (Sum and Jessop 2013: x; Jessop and Sum 2010). By sense-making, Sum and Jessop (2013: x, 3) specify that this process is one of "apprehension of the natural and social world[s]" in their myriad virtual and real presentations. Meaning-making is inextricably tied to sense-making, and refers to "processes of signification and meaningful communication" expressed through linguistic and non-linguistic means (Sum and Jessop 2013: x, 3). Together, through these sensory and analytical processes, respectively, semiosis "give[s] meaning to the world" and provides individuals with accessible and expressible construals of the natural and social worlds (Sum and Jessop 2013: 3). In a similar effort to reduce complexity, individuals engage in structuration: an enforced limitation (through selection) of "compossible" relations[66] at any given moment (Sum and Jessop 2013: 4).[67] Thus, from innumerable potential possibilities, through structuration, the amount of possibilities that can occur in relation to one another is reduced to a smaller subset of "compossibilities." While semiosis and structuration are distinct means of complexity

[66] Meaning things, or possibilities, which can exist in conjunction with one another.
[67] The use of structuration by Sum and Jessop (2013) is distinct from the concept of structuration advanced in Giddens (1976), Giddens (1979), and Giddens (1984). In the case of the latter, structuration refers to the process of reproducing social structures and social systems through individual action (van Rooyen 2013: 498; Leydesdorff 2010: 2139), while in the case of the former, structuration refers to an ongoing process of limiting "compossible" (social) relations to reduce complexity (Sum and Jessop 2013: 3).

reduction, as posited by CPE, they should not be seen as mutually exclusive processes; rather, they are dialectically related[68] and maintain equal standing in their importance to complexity reduction (Jessop and Sum 2017).[69]

In CPE, the central concept emerging from complexity reduction is the formation of 'imaginaries.' Imaginaries are semiotic ensembles, or systems, that "frame individual subjects' lived experience of an inordinately complex world and/or inform collective calculation about that world" (Jessop 2010: 344; Levy and Spicer 2013).[70] Simply put, they are meaning systems through which one can understand the world; albeit in a simplified manner (Mayblin 2016: 821). While imaginaries are formed at the individual level, they can be held at a collective level as a way for groups to "relate to their environments, make decisions, or pursue more or less coherent strategies" (Jessop 2013: 235). Irrespective of the form that the imaginary takes (e.g., economic, political, social, or other referents), the potential exists for it to become sedimented[71] through a process of variation, selection, and retention.

Every imaginary begins as a construal of some material or social process formed via complexity reduction through semiosis (Mayblin 2016: 821). As construals are subjectively formed, boundless variation exists as to the form that the construal may take (i.e., the

[68] Semiosis and structuration co-evolve in relation to a material reality, and this evolution produces a result that is irreducible to the parts from which it arises – thus, Sum and Jessop's (2013) use of the term "emergent properties."

[69] It should be noted that while complexity may be reduced and made comprehensible through these two processes, the product of this reduction should not be conflated with the totality of that which has been reduced. Any reduction of complexity necessarily results in the elimination of idiosyncrasies and subtleties of a heterogeneous whole in favor of a homogeneous construal. It follows that such movement from whole to construal introduces a degree of fragility and incompleteness into the homogeneous reduction (Taleb 2012) – a fact that is significant in relation to the to-be-discussed formation and use of imaginaries.

[70] This is similar to the conception of a 'frame' as defined by Rein and Schön (1991: 262).

[71] Generally, in the context of CPE, 'sedimented' can be understood to be the assumption of material form (through continuous practice or belief) by a construal, idea, imaginary, or institutional practice or arrangement. This term will be discussed and defined in greater detail below.

process of variation). Over time, a construal can be privileged for selection over the multitude of other construals (i.e., the process of selection). The selection of a construal is partially a function of the constraint of compossibility resulting from structuration through four "selectivities": structural, discursive, technological, and agential (Belfrage and Hauf 2017: 255).[72] Through on-going material verification and social realization of the construal, it can be retained as a sedimented imaginary (i.e., the processes of retention and sedimentation). Although imaginaries are *per se* discursive[73] constructions that can be communicated by and shared amongst individuals, their formation involves discursive as well as material and other contextual considerations. Throughout the process of variation, selection, and retention, fluidity exists in what may be considered a discursive-material continuum,[74] which can aid or prevent imaginaries from being selected, retained, and potentially sedimented (Belfrage and Hauf 2017: 256f).

Within CPE, imaginaries assume an essential position: they form the ideational lenses through which individuals perceive the world as it was, is, and could be. They constitute the ultimate achievement of complexity reduction through the processes of semiosis and structuration. Yet, as alluded to above, they are incomplete representations of

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[72] Structural selectivity denotes the "asymmetrical configuration of structural constraints and opportunities" on individuals and groups to pursue their desires (Sum 2015: 214). Discursive selectivity refers to the constraints imposed on linguistic expressivity by the medium and means through which that language is being expressed (Sum 2015: 214). Technological selectivity is defined by two aspects: (1) the "material and intellectual" aspects of producing objects and the associated "technical and social relations" to such production, and (2) the power/knowledge of an individual or institution to both discipline individuals or groups and to limit the imagining of alternatives to a particular way of acting (Jessop 2015: 21f). Finally, agential selectivity means the capacity of an individual or group to significantly influence moments of time through its (or their) ability to "exploit structural, discursive, and technological selectivities" (Jessop 2015: 22).

[73] As noted by Sum and Jessop (2013: 97), the term 'discourse' denotes the practice of "sense- and meaning-making" at the levels of linguistics and semantics. A corollary flowing from this position is that 'discourse' must be situated within broader contextual considerations.

[74] This continuum implies that at various moments of time, discursive considerations may be weighed greater by individuals or groups in the formation of a construal or of an imaginary, or when seeking verification of the construal or of the imaginary, while at other times, material considerations may play a more prominent role; see Sum and Jessop (2013: 403f).

the reality to which they refer. An example being an imaginary holding that housing prices only increase (i.e., pre-2007/8 financial crisis); only to have that imaginary challenged by the reality of sharp price declines. Thus, imaginaries are subject to contestation, and even those seemingly occupying hegemonic intellectual standing are susceptible to ruptures in their acceptance.

Again, as emphasized in this chapter, CPE holds that imaginaries are influenced by semiotic and extra-semiotic factors, and cannot be reduced to or explained by any one of these. Thus, CPE-based research must include discursive as well as material considerations, as these considerations dialectically influence the formation of imaginaries through the complexity reducing processes of semiosis and structuration.

CPE: Ontology and Epistemology

With CPE's concepts and analytical positions in-mind, it is advantageous to take a step back and briefly highlight the ontology[75] and epistemology[76] undergirding this theory. In doing so, perspective on the rationale behind these concepts and positions can be further clarified.

The ontological foundations of CPE derive from the theory's commitment to the philosophy of critical realism (Jessop and Sum 2017: 345). Developed by Roy Bhaskar, critical realism stems from the tradition of philosophical realism, but rejects both naïve realism[77] as applied in positivist research and strict constructivism[78] (Fairclough 2005). Key to this philosophy is the notion that there does exist a material reality beyond the linguistic

[75] Ontology meaning philosophical inquiry dealing with the nature of being.
[76] Epistemology meaning philosophical inquiry concerned with knowledge.
[77] See Braver (2007) for a summary of traditional realist commitments. For a discussion of these commitments, see DeLanda and Harman (2017: 27-48).
[78] See Mir and Watson (2000), Woodside (2003), and Latour and Woolgar (1986) for the commitments held by constructivists.

constructions and interpretations of human beings – hence its claim to realism (Assiter 2013). Simply put, reality cannot be reduced to language (Peters et al. 2013: 338). Moreover, critical realism, posits that non-discursive events – such as a lightning strike – can influence social processes and reality; language does not have sole claim as influencer of the social (Harré and Bhaskar 2001). Nevertheless, critical realism does not posit that the social can be reduced to the material alone – hence its claim to a critical version of realism (Archer et al. 1998). Rather, at various levels, modes, and scales of existence, the material and the social worlds cannot be wholly separated from each other and can even be seen to engage interactively (Peters et al. 2013: 338).

CPE retains the commitments of critical realism and its progenitors related to this ontology in a few key ways. For instance, drawing on the critical realism of Bhaskar (1975), Sum and Jessop (2013: 9) posit that the social world is informed by dialectical relations between semiotic and material elements. Thus, to CPE's authors, social action in the natural world can cause change in this realm (e.g., the ecological impacts of diamond mining for wedding rings) and, likewise, the non-social can influence the social (e.g., the issuance of Plague Orders during London's Great Plague of 1665-1666[79]). While CPE acknowledges the existence of a "real world" which predates human beings' attempts to reduce the complexity of its phenomena, it maintains that neither actors nor observers have "direct access" to the "real world" and its myriad objects (Sum and Jessop 2013: 3). Moreover, as Sum and Jessop (2013: 3) state that all "permutations of social relations" are not "realizable in the same time-space," CPE commits itself to the irreducibility of these relations to their effects alone, and implies that, at any point in "time-space," the relations do not reveal the totality of their potential expressions.

[79] See Defoe (2010) for an exposition of these orders.

Similar to its ontological position concerning the lack of *direct access* to the 'world', from an epistemological standpoint, CPE assumes that activities producing knowledge can "never exhaust the complexity of the world" (Sum and Jessop 2013: 5). This leads CPE's authors to posit that knowledge is "always partial, provisional, and incomplete" and its production – through scientific means or otherwise – is a "continuing but discontinuous process" (Sum and Jessop 2013: 5f). Further, drawing on its ontological wellspring, CPE differentiates between the actual – that which is actualized and observable – and the real – those capacities with which the intellect may contemplate but that are not sensed. This allows CPE to advance its skeptical position towards the accrual of knowledge. Given the ontological difference between the actual and the real, CPE rejects the strict inference of causation from "empirical regularities" – (complete) observation of or interaction with the actual does not wholly reveal the capacities of the real (Sum and Jessop 2013: 9). Finally, CPE adopts the epistemological positions that knowledge claims are both inevitably situated in a broader context – thus requiring this context be explored to more thoroughly understand the claim – and that the knowledge of an object is not passive in relation to the object (Sum and Jessop 2013: 5f).[80]

Situating CPE in Relation to Other Approaches to Rulemaking

Before reviewing how CPE is utilized in existing research, and how this thesis intends to employ CPE to study OTC commodity derivative rulemaking, it is worth briefly returning to,

[80] Supporting this epistemological position, CPE advances the notions of intransitive and intransitive moments of scientific inquiry (Jessop and Sum 2016: 106). The inclusion of these moments stems from CPE's adoption of a critical realist ontology. By intransitive, CPE's authors mean "the external world" that is "taken as an object of inquiry"; thus, that which is operates independently of the observer (Jessop and Sum 2016: 106). The transitive, however, refers to the practices, communities, and bodies of socially produced knowledge about the intransitive, external world (Jessop and Sum 2016: 106; Sum and Jessop 2013: 6). Knowledge, according to Sum and Jessop (2013: 6), is thus the result of the interplay between intransitive and transitive dimensions of inquiry and capable of being influenced not only by seemingly disinterested observations but also by the pre-existing knowledge regimes afforded by the transitive.

and commenting on, this theoretical framework's situation in relation to other approaches to engaging rulemaking.

As noted in Chapter 3, and as presented in the introductory remarks of the instant chapter, CPE has been chosen to inform the analysis of OTC commodity derivative rulemaking because its multifaceted nature and analytical lenses allow for a micro- to macro-level examination of rulemaking. Moreover, in having this perspective, CPE facilitates the exploration of those semiotic and extra-semiotic factors that interacted and co-evolved to condition the OTC commodity derivative regulations' development. In contrast to the other analytical approaches that were critically reviewed in Chapter 3 – such as the ACF and narrow rule content analyzes – CPE is both sufficiently broad and conceptually developed so as to permit additional potentially significant variables that might be missed in these other approaches to be considered in an analysis of rulemaking. These include the impact of discursive considerations on rulemaking (e.g., the conditioning effect of existing agency regulatory precedent on the formation of a new rule; seen from both the standpoint of the semiotic as well as the discursive selectivity), the influence of chairpersons on this administrative process (as seen through the agential selectivity), and the relevance (and importance) of 'imaginaries' to policymakers' rulemaking endeavors. While CPE advances beyond existing analytical approaches to rulemaking (e.g., the ACF), it should not, however, be seen an incompatible with these.

For instance, CPE does not diminish the potential impact of advocacy coalitions on policymaking (Jessop 2010: 339). A CPE-informed analysis might suggest that an advocacy coalition's success in having its views on a regulatory matter reflected in the prescriptive content of a rule be explained by more than a simple synchronicity in beliefs between the dominant external coalition actors and internal agency policymakers with the discretion to write rules. Although intersecting harmonious beliefs might play a role influencing policymakers' selection (and potentially retention) of a particular regulatory approach, CPE demands that other pertinent semiotic and extra-semiotic considerations be assessed to explain why such a position was adopted (e.g., the expressed policy beliefs of the external coalition advocating for fewer regulations through comment letters being appropriated and translated into rule text given agency policymakers' interest in keeping the institution's legal enforcement costs down given budgetary cuts imposed by Congress and the opposition of a newly elected President to pervasive regulatory enforcement proceedings).

Additionally, CPE undoubtably does not prevent analyses from engaging with rule content, which can be a central component of a CPE-backed rulemaking analysis, and, in fact, serves as the analytical entry-point into this study's exploration of OTC commodity derivative rulemaking. Rather than espousing an analysis that solely focuses on identifying the discursive links between rule text and submitted outside party comment letters to understand the construction of a regulation, a CPE-informed analysis would seek to explore the broader and co-evolving semiotic and extra-semiotic milieu in which the rule's development is situated; thereby establishing a more detailed picture of how the rule in question was constructed, and why the regulatory approach contained therein was selected and retained by policymakers. This could, for example, mean assessing an administrative agency's appropriation of informative regulatory content from a comment letter into rule text alongside factors such as the influence of an agency's chairperson whose articulated regulatory vision is compossible with, and overtly sympathetic to, the adopted regulatory position, and who both possesses the voting support of a majority of agency commissioners and has the ability to set the institution's regulatory agenda.

Given the above reviewed situation of CPE in relation to other approaches engaging rulemaking, it can be suggested that such presented approaches can even be seen as complementary to a CPE-based analysis of rulemaking. While this study of OTC commodity derivative rulemaking does not endeavor to conduct a grand synthesis of policymaking frameworks, where applicable, it will make reference to important considerations derived therefrom (e.g., the impact of aligned external public advocacy groups, or coalitions, on the OTC commodity derivative rulemaking process). Furthermore, and as intimated earlier, in moving beyond the existing approaches to analyzing rulemaking, employing CPE can further knowledge of those potentially vital considerations to this administrative process that are largely missing from current rulemaking scholarship, such as the chair's influence on regulatory formation (as seen through the lens of CPE's agential selectivity), linking the production and content of rule texts to the interaction and co-evolution of semiotic and extra-semiotic factors, and the implications of 'imaginaries' to rulemaking.

THE APPLICATION OF CPE IN EXISTING RESEARCH

Having set out the core principles of CPE, this section explores how CPE has been applied in existing research. Providing an overview of previous use of CPE as a research program serves as a springboard into the application of CPE in this study's analysis of OTC commodity derivative rulemaking (a matter detailed in the section to follow). In focusing on a range of research emphasizing various aspects of CPE, this section includes work by the theory's authors – Sum and Jessop – and other authors similarly concerned with CPE as a research tool. It should be made clear that this section does not intend to provide for a comprehensive review of *all* research employing CPE as a theoretical framework. Rather, drawing on selected works considered germane to the CPE approach to be taken in this paper’s research on OTC commodity derivative rulemaking, this section enunciates how these selected works used CPE to inform their research and to derive their central findings.

One such piece, comprising a chapter in Sum and Jessop’s seminal book on CPE, *Towards a Cultural Political Economy*, deploys the theory to provide an account for how the 2007-2008 financial crisis was construed, and how these construals influenced the subsequent economic recovery (Sum and Jessop 2013). As OTC (commodity) derivative rulemaking emerged as a response to this same financial crisis, briefly exploring how the CPE-based framework for analyzing financial crisis construals was structured can provide insight into how CPE may be used in connection with the upcoming analysis of rulemaking.

In their chapter on financial crisis construals, Sum and Jessop (2013: 395ff) begin by situating their case within the context of ‘crisis.’ The authors assert that ‘crises’ are periods of time in which “accepted views of the world and how to ‘go on’ within it” are disrupted, thereby potentially opening new avenues for construals of events, circumstances, and policy paths forward (Sum and Jessop 2013: 395f). Additionally, Sum and Jessop (2013: 397) posit that as ‘crises’ are “never purely objective,” such occurrences do not result in a preordained outcome; rather, intense fluidity may exist regarding both the apprehension of the causes and meaning of the crisis, and the determination of remedies to the crisis.

Because ‘crises’ are not “purely objective” phenomena capable of being apprehended in their totality, individuals (and social actors) engage in complexity reduction through the processes of semiosis and structuration (as defined in the preceding section) to interpret these events in an effort to ‘go on’ in the world (Sum and Jessop 2013: 397). It is at this juncture that the CPE research program analyzing these complexity-reducing mechanisms begins. Sum and Jessop (2013: 402-405) focus their analysis on the variation, selection, and retention of construals during the period of potential ideational fluidity afforded by the financial crisis. In this case, the authors note that myriad construals of the financial crisis existed in the event's early phases; i.e., the notion of variation (Sum and Jessop 2013: 404). Nevertheless, as time passed, and as these construals both competed with each other and were tested for their meaningfulness in interpreting and making sense of the crisis, many construals were disregarded and failed to be selected (Sum and Jessop 2013: 404).

Yet, according to Sum and Jessop (2013: 404f), the construals of the financial crisis that were selected exhibited certain characteristics. Specifically, and congruent with the conceptual propositions of CPE, the selection of a crisis construal was, according to the authors, subject to validation from both semiotic and – in their words – "extra-semiotic" factors (Sum and Jessop 2013: 404f). In regard to the semiotic, for example, Sum and Jessop (2013: 404f) state that the political efficacy of certain narrated construals and their resonance with the articulated political and social agendas of stakeholders (e.g., policymakers and social movements) were important criteria for the selection of a crisis construal. Furthermore, in keeping with the CPE research program, the authors posit that the aforementioned semiotic factors do not alone account for the selection of a construal, but that the discursive, structural, agential and technological selectivities (defined above) of the "extra-semiotic" are also crucial components (Sum and Jessop 2013: 405). For instance, Sum and Jessop (2013: 405) propose that "the organization and operation" of the media that is responsible for broadcasting a construal, and the social positions of those individuals associated with a crisis construal, are, among other 'extra-semiotic factors,' noteworthy aspects in determining a construal's selection.

For those financial crisis construals which were selected, there existed the possibility for their retention and ensuing sedimentation as 'imaginaries' – those 'semiotic ensembles' capable of structuring complexity and serving as the lens through which to apprehend the world. As Sum and Jessop (2013: 405) note, the retention of a construal – and its subsequent sedimentation – was dependent on its verification through its achieving (real or the perceived-to-be real) compossibility with existing "material interdependencies" and "social relations." This means that, in the case of financial crisis construals, their retention (and sedimentation) was contingent on continued narrative efficacy and resonance – as semiotic aspects – as well as their viability both when embedded within sets of social relations, and in relation to non-social, real events – as 'extra-semiotic aspects' (Sum and Jessop 2013: 405).

The structure of the authors' approach to their CPE analysis of crisis construals is a function of their central research object – non-objectively determined *construals*. As alluded to above, analyzing this research object within a CPE framework necessitates examining factors such as context, semiosis, and structuration. This is undertaken with the result being both the development of a "heuristic schema" (Sum and Jessop 2013: 403) accounting for the factors shaping financial crisis construals, and an understanding of how these construals may become sedimented and institutionalized in the form of an imaginary, which can potentially influence policy decisions. In relation to the specific research focus of this current thesis, Sum and Jessop's application of CPE to the analysis of financial crisis construals provides a useful means of structuring a case study involving an examination of potential influences on policymaker perceptions during and in response to financial crisis. Nevertheless, as will be discussed in the following section, some modifications to this CPE structure will be made for the case of OTC commodity derivative rulemaking in the post-financial crisis, Dodd-Frank era.

Another work substantially applying CPE to the study of policymaking comes from the above referenced Ngai-Ling Sum. In Sum (2015: 211), the author analyzes the articulation of “competition, competitiveness, and competition policies” in Asia by the World Bank and the Asian Development Bank since the 1997 Asian financial crisis. Although Sum (2015) generally engages the gamut of CPE concepts in this piece, the analytical focus of and entry-point for the work are the four selectivities proposed in CPE: the discursive, the structural, the agential, and the technological. In using the selectivities to guide its research aim, Sum examines how these selectivities interacted to change and to sediment “policy discourses and practices” of the two banking institutions as pertaining to their aim to enhance economic competitiveness and reduce poverty in Asia after the 1997 financial crisis (Sum 2015: 211). The justification given for structuring this CPE-based research approach is that the four selectivities enable, shape, and influence the process of variation, selection, and retention, respectively, within the broader context of the co-evolution of semiosis and structuration (Sum 2015: 214).

Sum (2015: 216f) begins the analysis of the articulation of competitiveness and competition – and its related policies – by accounting for the post-Asian financial crisis structural context (selectivity). In this, the author emphasizes that during the Doha Round of the WTO’s international trade negotiations, many developing Asian countries opposed the outright market liberalization policies espoused by international institutions (e.g., the World Bank) as part of the Washington Consensus[81] (Sum 2015: 2016f). Although this opposition was, according to Sum (2015: 216f), successful in preventing certain “competition policy issues” from being included in the final trade negotiations, the author

[81] A set of economic reform policy instruments and recommendations for developing countries that centered around fiscal austerity and market liberalization and that were promoted by the International Monetary Fund, the World Bank, and the U.S. government (Black et al. 2017).

notes that this failure of Washington Consensus policies to be perpetuated did not spell an end to the market liberalization ideas advanced by institutions such as the World Bank and the Asian Development Bank. Rather, these institutions exploited discursive, agential, and technological selectivities to re-contextualize and re-articulate liberalization policies using a palliative narrative focused on alleviating poverty through knowledge transfer, competition, and growth; which would become known as the post-Washington Consensus (Sum 2015: 225). Namely, this shift in narrative (discursive) and the concomitant development of rules, tools, and methods aimed at measuring and ensuring the viability of the post-Washington Consensus policies (technological) under the direction of elite actors (agential) – such as the famous economist Joseph Stiglitz – enabled the World Bank and Asian Development Bank to continue contested liberalization reforms in Asia (Sum 2015: 225).

In arriving at this conclusion – one which illustrates the ability of a sedimented economic imaginary (i.e., the need for market liberalization) to be re-contextualized when challenged – Sum (2015) engages, albeit generally, the key aspects of the CPE. Nevertheless, this is done in an idiosyncratic manner as the four selectivities are utilized as the analytical entry-point, as opposed to the bottom-up, 'construal to imaginary' approach taken by Sum and Jessop (2013). The CPE approach taken by Sum (2015) highlights the importance of the four selectivities to the theory's research program, in addition to demonstrating the malleability of CPE when applied in practice.

Other applications of CPE have been made across a spectrum of academic disciplines. These works apply CPE in a variety of ways, ranging from 'practising' CPE by drawing on one or a few of its noteworthy concepts, to following the entirety of CPE's basic framework. Many of the studies 'practising' the theory use CPE's concept of imaginaries and their potential effects on policy as the cornerstone of their analyses. Although using imaginaries as an analytical entry-point is feasible, providing a robust, defensible explanation of the development and influence on policy of these imaginaries necessitates at least an engagement with the co-evolution of semiosis and structuration (and their attendant processes and selectivities). This is something which many of the imaginary-focused research pieces lack. Moreover, as can be seen in several of these works, the notion of imaginaries adopted by the authors is not tied to economic referents (i.e. economic imaginary), but engages a panoply of non-economic referents.

One such example of a CPE imaginary-inspired piece comes from Levy and Spicer (2013). In this work, the authors propose the existence of four 'climate imaginaries'[82] and then analyze how these imaginaries influence activities of industry and policymakers as concerns climate change. It is important to note that, in this research, the authors do not elaborate on the construction of the four imaginaries, but simply posit their existence as derived from "observation and analysis of the various framings and positions adopted by actors and the media" (Levy and Spicer 2013: 663). This omission notwithstanding, the authors use the presupposed imaginaries to reflect on their influence on climate and energy policy debates from the 1990s until the article's publication, and then analyze why certain 'climate imaginaries' attained hegemony over this period (Levy and Spicer 2013: 667-72). Through their analysis, Levy and Spicer (2013: 675) conclude that policy responses by "firms, governments and NGOs" to climate change will reflect the dominant 'climate imaginary' at the time of the imaginary's formulation.

[82] The imaginaries are as follows: (1) Fossil fuels forever, (2) climate apocalypse, (3) techno-market, and (4) sustainable lifestyles (Levy and Spicer 2013: 663). As the names suggest, the imaginaries refer to perceived perpetual use of fossil fuels, a climactic catastrophe, a market-based technological solution to climate change, and the adoption of simpler, less materialistic lifestyles to halt climate change, respectively.

Although Levy and Spicer (2013) weave a cogent argument concerning the influence of 'climate imaginaries' on the climate policy actions of various stakeholders, they do not consider how these actors may themselves shape the imaginaries. This stems from the paper's exclusive analytical foci on the influence of 'climate imaginaries' and why certain 'imaginaries' become dominant at a given time. Thus, in the spirit of only 'practising' CPE, Levy and Spicer omit discussion of complexity reduction, semiosis, structuration through the four selectivities, as well as variation, selection, and retention.

A further example of using the concept of imaginaries to 'practise' CPE comes from Grubbauer (2014). In this piece, imaginaries are used as the focal point for research into architectural practices in urban development. Specifically, Grubbauer (2014) employs the notion of an economic imaginary in conjunction with an analysis of the architecture of specific office buildings in Vienna. The position developed is that a perceived mode of organizing economic activity (i.e., an economic imaginary) has greater salience if expressed materially through architectural design. To arrive at this conclusion, Grubbauer (2014) examines how these economic imaginaries are discursively and visually articulated in local planning debates, and in business marketing advertisements. Like Levy and Spicer (2013), this author's analytical focus on CPE-posited imaginaries neglects to account for other aspects of the theory, but does so intentionally. Grubbauer (2014: 339) explicitly states that the research is limited to an exercise in "practising CPE" as opposed to assiduously following each tenet of the CPE research framework.

Heinrich (2015), likewise, 'practises' CPE in exploring the imaginaries posited to develop European Union (EU) policy in response to the 2007-2008 financial crisis. While not formally engaging the CPE derived processes of semiosis and structuration, Heinrich (2015) does analyze the interplay between semiotic and 'extra-semiotic' features influencing the reproduction of imaginaries informing EU policymaker responses to the financial crisis. Heinrich (2015: 701f) posits that sedimented discourses emphasizing competition, in response to, and de-emphasizing structural problems (such as banking and regulatory mishaps), as causes of, the financial crisis (semiotic), served, in addition to the EU's situation as an international economic power ('extra-semiotic'), to influence EU policy response so it broadly perpetuated the pre-crisis economic status quo. Moreover, Heinrich (2015: 702) notes that although the EU's response to the financial crisis was, at least in part, informed by a pro-market imaginary, undertaking this response served to further embed (sediment) this imaginary into the minds and institutional practices of EU policymakers. Thus, while the imaginary resulted from an interplay of semiotic and 'extra-semiotic' factors, the validation of this imaginary in a moment of crisis – through its ability to perceptibly structure the complexity of such an event – has further influenced EU economic policy discourses and the EU's chosen route on economic matters.

Authors Su, et al., (2018) similarly focus on the dialectic between semiotic and 'extra-semiotic' factors – in their words, "cultural/semiotic and economic/political dimensions" – in assessing heritage tourism[83] in urban settings. These authors, however, do not engage CPE in their analysis beyond the foregoing dialectically-related division, even excluding the notion of imaginaries in favor of the term "framing" (Su et al. 2018: 30). Nevertheless, their application of CPE to a domain seemingly unrelated to political economy does shed light on the interrelations between the "cultural/semiotic and economic/political dimensions" of a tourist site, and the meaning of the site as intuited or arrived at by tourists (Su et al. 2018: 36ff).

[83] Although this term is not defined in Su et al. (2018), one can infer from the paper that heritage tourism means tourism of historical and traditional sites.

Finally, in contrast to the preceding articles 'practising' CPE through their application of one or a few of the theory's concepts, Mayblin (2016) utilizes the full theoretical framework, as put forth in Sum and Jessop (2013), to analyze UK asylum policy. In this work, Mayblin (2016) begins with an analysis of the 'pull factor'[84] idea of asylum seeking with a presentation of current United Kingdom (UK) asylum policies. The author then proceeds to engage the notions of complexity reduction, semiosis, structuration, as well as variation, selection, and retention to test if and, ultimately, to explain why, the 'pull factor' is the dominant imaginary informing UK asylum policy. By following the CPE research program, and in analyzing the semiotic and 'extra-semiotic' influences on the process of variation, selection, and retention, Mayblin (2016: 823-26) concludes that the 'pull factor' is the dominant imaginary informing UK asylum policymaking because it provides a simple, ostensible narrative concerning asylum-seeking, and is affirmed by institutional practices such as strictly categorizing migrants either as asylum seekers or as economic migrants. Thus, key to this work is complexity reduction as a means by which policymakers make sense of a situation, and then use those impressions when undertaking (or not undertaking) policy interventions (Mayblin 2016: 825). Obviously, this process will be of importance to the analysis of OTC commodity derivative rulemaking.

The above examples of the application of CPE in existing research reveal that CPE-informed research may be structured in a variety of different manners – ranging from following the bulk of the CPE research program, such as in the work of Sum and Jessop (2013), as well as Mayblin (2016), to using specific CPE concepts as an entry point into the analysis of a phenomenon, such as in the work on 'climate imaginaries' undertaken by Levy and Spicer (2013). This range in CPE structure stems from the differences in analytical foci

[84] This is the idea that better economic and social rights in certain countries attracts, or 'pulls', migration of individuals from other countries.

of these research projects. Thus, it can be assumed that as a theoretical framework, CPE may be operationalized in a relatively heterogeneous fashion. In the upcoming section of this chapter, the approach to CPE, taken in conjunction with the case of OTC commodity derivative rulemaking at the CFTC between 2010 and 2016, will be set forth in detail.

A CPE APPROACH TO OTC COMMODITY DERIVATIVE RULEMAKING

Considering the heterogeneity of current research applications of CPE, this project approaches CPE from the standpoint of both engaging in its 'practise' while following the bulk of its research program. As such, the key concepts of CPE's analytical gaze – such as complexity reduction through semiosis and structuration, the evolutionary process of variation, selection, and retention (sedimentation), and imaginaries – will centrally inform the later unfurled analysis of OTC commodity derivative rulemaking. Unlike those articles that simply 'practise' CPE by using a selection of its concepts, this research project will explore each of these concepts in relation to the case at-hand. Thus, this study's approach to CPE will be similar to that of Sum and Jessop (2013) and Mayblin (2016) in that it engages with the full spectrum of the theoretical framework's concepts. Nevertheless, given that in the instant thesis, the CPE theoretical framework is being used to inform research in a new domain where not used before – financial regulatory rulemaking – certain modifications to the application of the theory are necessary. These adjustments arise in response to both a critical reading of CPE, and the information derived from this particular project's dataset.

In further explication of the approach to CPE reflected herein, it should be noted that the following matters will be taken up at this section's outset. First, a clarification of the term 'material', and its analogous uses in the context of CPE. And second, a recital of how each of the CPE concepts discussed in this chapter's first section are treated and utilized in connection with OTC commodity derivative rulemaking will be presented. (This recital serves as the basis for sub-lines of inquiry into the OTC commodity derivative case, and for the methodological approach that will be discussed in the next chapter, Chapter 5.)

On the Definition of 'Material'

One of the centerpieces of the CPE framework is its position that political-economic phenomena have both semiotic and 'extra-semiotic' dimensions (Jessop 2004: 163f). For instance, a country's energy policy cannot be solely explained by internal political debates or perceived cultural affinities with energy-rich foreign regimes (as examples of the semiotic), but must include considerations such as the historical development of energy infrastructure, tax treatments for energy sources, or even the country's geological situation (as examples of the 'extra-semiotic'). Although the preceding may appear as an intuitive example of the divisions between the semiotic and 'extra-semiotic' dimensions to energy policy within the context of CPE, a subtle, yet crucial distinction pertaining to the 'extra-semiotic' must be made. Namely, the difference between the geological situation – taken symbolically – and the two preceding variables (energy infrastructure and tax treatments). Making this distinction – as will be done below – is helpful in elucidating how this paper will approach the term 'extra-semiotic,' or 'material,' within the CPE framework.

As per Sum and Jessop (2013: 158), what divides the semiotic from the 'extra-semiotic' is discursive influence. In the case of the former, a "semiotic moment" is characterized by the influence of discourse, and in the case of the latter, a "non-semiotic moment" is characterized by the influence of non-discursive, "structural ('material')" factors (Sum and Jessop 2013: 158). Nevertheless, CPE-informed research often includes elements of the discursive in its categorizations of the 'extra-semiotic' or 'non-semiotic' (Jessop 2010: 338). Turning back to the above example, a reasonable argument could be made that both the historical development of a country's physical energy infrastructure and taxation schemes have, at some point and to some degree, been, or, currently are, influenced by (broadly speaking) discourse. Moreover, to an example specific to CPE, the theory often treats social relations and institutions as falling within the taxonomy of 'extra-semiotic' (Starrico 2017: 335). Yet, as with the previous example, a valid argument could be made that neither social relations nor institutions are wholly exempt from the influence of the discursive (DeLanda 2016; Jones 2008: 393). The geology of a country (e.g., its transform faults, astroblemes, anticlines, etc.), however, is not dependent on discourse in order to exist (DeLanda and Harman 2017: 37ff).

Given that CPE's treatment of 'extra-semiotic' may include both those things subject to discursive influences (e.g., existing tax structures, sets of social relations and structures) and those that are not (e.g., radiation from a uranium deposit), and that 'extra-semiotic' may, nonetheless, be used interchangeably with the term 'material,' making a distinction as to how this research interprets the term 'material' is crucial.[85] The first part of this distinction is straightforward: 'material' will not correspond to Hegelian-Marxian-inspired forms of materialism. The second part is to define 'material' as being that which exists independent of discourse (DeLanda and Harman 2017: 6-11). The final part is to view CPE's notion of 'extra-semiotic' as comprising two variables: that which is treated *as if* it is 'material', and that which *is* material. To return once more to the above example, the historical development of energy infrastructure (i.e., the context it provides to current energy policy, but not the actual crude oil reservoirs, or the sun's photons reaching the Great Basin) and energy tax treatments (i.e., as a social practice subject to revisions by the

[85] It is worth noting Levi Bryant's criticism of the term 'materialism' and its corollary 'material': "[…] materialism has become a *terme d'art* which has little to do with anything material. Materialism has come to mean simply that something is historical, socially constructed, involves cultural practices, and is contingent" (Bryant 2014: 2). Although CPE admirably attempts to differentiate between the semiotic (discursive) and the 'extra-semiotic' ('material'), it does not do so fully and can be subject to Bryant's critique.

International Accounting Standards Board or the Financial Accounting Standards Board) would be viewed – because they do not exist wholly independent of discourse – *as if* they are 'material' dimensions within the semiotic–extra-semiotic dichotomy. But only the country's geological situation would be interpreted – because it exists wholly independent of discourse[86] – as 'material'.

Making this distinction serves as a clarification of one of CPE's central concepts, and not as a rebuttal of the importance of the extra-semiotic in influencing complexity reduction through semiosis and structuration. Elucidating this point, however, is not without precedent. Sum and Jessop (2013) routinely refer to the 'natural world' (i.e., objects outside of the 'social world') when discussing 'material' aspects of the extra-semiotic, and, as noted above in the case of financial crisis construals, the authors reference such 'material' aspects separately from, but in conjunction with, social relations which are treated *as if* 'material.'[87] Moreover, as will be further explored below, CPE's notion of 'sedimented' can confer a sense of materiality onto an imaginary (i.e., a semiotic ensemble). Nevertheless, given that a sedimented imaginary requires, at some level, continued semiotic expressivity to remain sedimented, such sedimented imaginary can at most be interpreted as if it is 'material,' and not actually material. For instance, as Sum and Jessop (2013: 37, 90) state, sedimented is synonymous with "taken for granted"; thus,

[86] As stated above in citing Peters et al. (2013), the social world may, however, influence the material world and its constituent objects. For instance, from a realist ontological perspective, although the Earth's lithosphere can be posited to exist irrespective of our discursive awareness of it, human consumption of fossil fuels – potentially undertaken to carry out discursively articulated energy policies – may affect the lithosphere either through the deposition of layers of fossil fuel-related soot or through the extraction of the fossil fuels from the lithosphere.

[87] Additional instances of this abound across these authors' research, including Jessop and Sum (2017: 345), Jessop and Sum (2016: 107), Jessop (2015: 21f, 40), and Jessop and Oosterlynck (2008: 1156f).

implying that its ‘materiality’ is constituted by its treatment as if ‘material,’ and not by the sedimented entity’s actual enduring qualities.

Regarding how this view of the term ‘material’ intersects with this research into OTC commodity derivative rulemaking, two points must be made. The first is that, where deemed significant to rulemaking, material objects will explicitly be included in the analysis of the semiotic–extra-semiotic dialectic, a dialectic which influences the complexity reducing processes of semiosis and structuration. And second, explicitly granting equal ontological status to those potentially significant objects which are divorced from discourse ensures that the approach to CPE taken herein retains what can be described as a flat ontology, by not privileging institutional arrangements, social practices, and sedimented discourses (among other examples of the extra-semiotic) over material objects, (events) such as a computer network failure during a critical stage of rulemaking.

CPE and OTC Commodity Derivative Rulemaking

As stated at the beginning of this section, the approach to CPE to be taken in this research project is one of applying the concepts generated by the theoretical framework to OTC commodity derivative rulemaking. Thus, an engagement with the intersection of OTC commodity derivative rulemaking and the concepts of complexity reduction through semiosis and structuration, the process of variation, selection, retention, and sedimentation, and imaginaries form the core of the forthcoming analysis. This is done in a manner largely consistent with the utilization of CPE in Sum and Jessop (2013) and Mayblin (2016). By employing CPE in this way, the analysis of OTC commodity derivative rulemaking identifies the semiotic and extra-semiotic variables conditioning the construction of OTC commodity derivative regulations, as well as examining how these factors interact and co-evolve to influence the variation, selection, and retention of such regulations over the researched rulemaking period. The information derived therefrom is then utilized in the context of CPE's notion of an imaginary to determine if a rulemaking imaginary – which serves as a guide along which policymakers organize rulemaking efforts – was sedimented, was refined, or evolved, given stable or changing semiotic and extra-semiotic supports. Together, this approach, grounded in above reviewed CPE literature, provides for an exploration of how CFTC policymakers constructed OTC commodity derivative regulations.

To further set out how this research project sees OTC commodity derivative rulemaking through the lens of CPE, the remainder of this section now turns to explicating this research project's theoretical commitments.

In keeping with CPE's foundational position, it is assumed that the fundamental nature of objects – be they social, material, etc. – presents beings with an ontological dilemma in that they are unable to wholly apprehend the totality of the objects' complexity. With regards to rulemaking, this means that neither policymakers nor other stakeholders wholly apprehend, and subsequently understand the entirety of, that to which their gaze is turned (e.g., regulated objects). Although CPE places emphasis on the observer's inability to perceive the totality of an object as the starting point for the need to reduce complexity (see above), a complementary notion originating from the purely realist ontology of 'Object-Oriented Ontology' should also be considered here. Simply, it is that all objects are characterized by withdrawal, in that an object is never manifested, in full, to an observer (DeLanda and Harman 2017: 105f, Harman 2016a: 10f, Morton 2013: 14f, 77). These complementary perspectives concerning the nature of objects and their complexity are adopted in this research project: policymakers and other financial regulatory stakeholders always apprehend less than the totality of any object.

To 'go on' in this environment characterized by the above limitation, it is accepted that policymakers are parties to semiosis and structuration as they seek to fulfill their requisite regulatory responsibilities (i.e., 'to go on').[88] For those aspects of an object that are apprehended, policymakers may attach particular significance. This attachment process can draw upon the existing "meaning systems"[89] held by the policymakers (Mayblin 2016: 821). As such, the identification of those things to which policymakers granted significance during OTC commodity derivative rulemaking constitutes an important aspect of this paper's analysis, which in this study include, among others, the following: the nature of the regulated derivative instrument and of the party transacting the agreement, the regulatory constraints and opportunities afforded by the statute authorizing rulemaking (i.e., the Dodd-Frank Act), the CFTC's existing regulatory precedent in the OTC commodity derivative marketplace, communicative interactions with external parties, and the Chairperson's regulatory vision (or policy preference) for the implementation of the statute.

Furthermore, it is assumed that what has been awarded significance serves as the basis for a given regulatory approach to OTC commodity derivatives. For instance, a discourse advanced by CFTC leadership directing agency officials to draft regulations amenable to particular OTC commodity derivative marketplace participants can be viewed as a significant semiotic influence on, and potential wellspring for, the drafted regulatory approach. As accepted herein, any approach taken to the regulation of OTC commodity derivatives is subject to either part or the entirety of CPE's posited model of variation, selection, and retention. For an example germane to the case of OTC commodity

[88] As noted above, this use of the term structuration is not to be conflated with the concept of structuration advanced in the work of Anthony Giddens.
[89] Such meaning systems are the product of historical process of complexity reduction through semiosis and structuration (Jessop 2010: 338). This implies that a policymaker should not be assumed to be a *tabula rasa*.

derivatives, consider a regulatory approach within the context of the rulemaking process (see Chapter 2). A regulation that has been published within a proposed rule may be subject to variation, selection, and retention in-full as rulemaking progresses to its final stage. This is because the proposed regulation may face contestation from both semiotic (e.g., outside party comments) and extra-semiotic (e.g., changes to the structure of agency leadership) sources, thereby inducing policymakers to revise the regulation (i.e., variation), to propose a new version (i.e., selection), and to retain and sediment it through the agency's formal adoption of the final rule. In other instances, a regulation in a proposed rule (i.e., one that is selected) may not revert to variation as the rulemaking process progresses because neither the proposed rule's semiotic nor extra-semiotic supports varied; thus, likely leading to the selected regulation's unaltered retention and sedimentation in final rule form.

Along these lines, analyzing *why* a particular regulatory approach was selected and retained, or returned to the stage of variation, is vital to the application of CPE utilized for this research project. Herein, it is assumed that these occurrences are attributable to the interaction and co-evolution of semiosis and structuration. Thus, it is essential to consider both the semiotic and extra-semiotic elements that served to condition the selection and retention, or the return to variation, of OTC commodity derivative regulations as contained within their respective rules.[90] From the standpoint of the semiotic, this includes those discursive influences on rulemaking that have been identified in the extant literature (see Chapter 3) – such as outside party comment letters and textual content supplied during documented *ex parte* communications between Commission officials and prospective

[90] Reference here is made to the discursive-material continuum discussed in the second section of this chapter. Again, implied by this continuum is that at certain moments, discursive factors may weigh more heavily in the selection and retention of a construal than their extra-semiotic counterparts, and vice versa.

regulatees – in addition to significant factors like the verbal or written speech acts of CFTC policymakers as well as those of other members of government regarding the Commission's regulatory endeavors (e.g., questions at a Congressional hearing) and (existing) policy texts, among other items.[91] And from the perspective of the extra-semiotic, this includes, where applicable, genuinely material considerations (discussed above), in addition to those influences as seen through lenses of the structural, discursive, technological, and agential selectivities (Belfrage and Hauf 2017: 255; Sum and Jessop 2013: 214-19).

To remind the reader, the structural selectivity references the often asymmetrically structured constraints or opportunities that act on someone or something as that entity pursues a specific objective (Sum and Jessop 2013: 214). Discursive selectivity relates to the asymmetrical restraints and opportunities on discursive productions (i.e., speech acts) that are associated with the use of certain genres, styles, and/or discourses (see 'order(s) of discourse' in Chapter 5) (Sum 2015: 214). The notion of a technological selectivity involves the material and intellectual forces that create or shape something, their attendant social and technical relations, and the power/knowledge of an individual or institution to both discipline individuals or groups and to limit the imagining of alternatives to a way of acting (Jessop 2015: 21f). Finally, agential selectivity refers to the capacity of an individual or group to impact events at junctures in time (Sum and Jessop 2013: 217).

As these definitions of the selectivities are abstract, their use in the forthcoming analysis can be more easily understood if they are conceptualized within the context of administrative agency rulemaking and as grounded in the rulemaking literature reviewed in Chapter 3.

[91] As can be gleaned from this list, the semiotic includes utterances of actors (e.g., policymakers, representatives of interest groups, and politicians) in addition to those presently inanimate sources of language (e.g., previously codified regulations).

The structural selectivity can, in this context, be broadly conceived of as the bounds (e.g., delegated authority imparted by the Administrative Procedure Act – see Chapter 2 – as well as the statute authorizing rulemaking or a particular institutional design or constitution) within which an agency conducts its operations and proceeds with rulemaking. For example, the Dodd-Frank Act empowered and directed CFTC policymakers to draft rules implementing it. Nevertheless, while the Commission had latitude in carrying out this mandate, it could not exceed the regulatory limits established by Dodd-Frank (e.g., it could not draft definitions of financial products that did not correspond with those in the law). Other examples of the structural selectivity include the opportunities and constraints on rulemaking that are associated with an intra-agency delegation of authority to a specific rulemaking area, such as to an internal rulemaking team (i.e., its institutional design), and the reconstitution of CFTC leadership through the arrival or departure of commissioners and/or the chairperson (i.e., the agency's voting members).

Meanwhile, the discursive selectivity can be seen as the limitations and opportunities afforded by different genres,[92] styles,[93] and discourses[94] on the speech acts (including written rules) of policymakers involved in rulemaking. For instance, the language of the Dodd-Frank Act provides the discursive limits to and space within which CFTC policymakers draft OTC commodity derivative rules (e.g., the regulations implementing the Act must be compossible with the statutory language of the overarching law). This may preempt other textual sources (e.g., the arguments of regulatee comment letters) from being utilized in conjunction with the language of the Act to inform agency regulations.

[92] Genres, as mentioned to above, are the mediums through which discourses can be accessed, such as rule comment letters, yearly presidential addresses, or newspaper op-eds (Fairclough 2013: 179).
[93] Styles are understood to be expressed ways of being, such as the pedantic manner in which a business executive may interact (verbally and through physical expression) with low-level employees (Taylor 2004: 437; Fairclough 2003: 23).
[94] Discourses constitute semiotic representations of events, things, and relations in both how they are in the present moment, as well as their imagined future states (Fairclough 2003: 23).

Additionally, a regulatory vision articulated by Commission leadership endowed with bureaucratic discretion to impact the agency's agenda and to condition a rule's ultimate content may enable or restrict outside parties' ability to influence, through their submitted comment letters, the character and content of the codified rule. A final example is that policymakers' use of a particular regulatory textual genre – like an 'interim final rule'[95] – might afford outside interested parties the opportunity to continue to comment on the rulemaking issue at-hand, thus potentially leaving the regulatory matter open to revision.

The technological selectivity within the context of administrative agency rulemaking can be understood to denote the internal and external forces on the agency and its policymakers that support or restrict regulatory endeavors through the provision or withholding, respectively, of material and intellectual inputs now or in the future. Two examples stemming from this selectivity are as follows. First, Congress's ability to grant or deny specific levels of monetary appropriations to the CFTC for its operation, the President's authority to intervene in an administrative agency's affairs, and the Judiciary's prerogative,[96] upon formal legal request, to review agency rules. And second, the provision or withholding of data, information, and perspective (together, intellectual resources) by a regulatee or a non-regulatee (e.g., a public advocacy group) in connection with rulemaking – either by formal (i.e., comment letters) or informal (e.g., *ex parte* meetings) means. In the analysis of OTC commodity derivative rulemaking that follows, the assessment of extra-semiotic factors as seen through the lens of the technological selectivity will primarily

[95] A final rule that is not preceded by the issuance of a proposed rule, but one that is, nonetheless, open to comment and potentially subject to revision.
[96] This example can likewise be assessed through the technological selectivity insofar as judicial review, or even the threat thereof, is an invoked force capable of disciplining an administrative agency and impacting its rule-makings by possibly requiring "arbitrary and capricious" rules to be rewritten. Nevertheless, as stated in Chapter 2, the Chevron Doctrine – which involves the judicial review of agency rules when challenged in court – usually entitles a grant of deference to regulatory agencies' understandings and interpretations of their own rules and regulations.

pertain to issues relating to the second example – the provision or restriction of intellectual resources by outside parties to CFTC policymakers. This is done because such resources can provide policymakers with a reservoir of content that can be used in the construction of regulations. Where applicable, however, Congressional, Presidential, and/or Judicial action will be contemplated in the discussions of the broader environment in which OTC commodity derivative rulemaking transpired.

Finally, in this same context, the agential selectivity presents itself as the capacity of an agency official or groups of officials (or even external actors, such as the President) to influence rulemaking. An example of this being the Commission's Chairperson exercising his or her bureaucratic discretion to set a regulatory agenda that reflects his or her vision (or specific policy preferences). Or more narrowly, it could also refer to a commissioner intervening in the formulation of a regulation on behalf of regulatees, like including in a rule's content requested conditionality for regulatory compliance. Although, where applicable and significant to the construction of OTC commodity derivative rules, the impact of other (policymaker) actors on rulemaking as viewed through the agential selectivity – or in relation to contextual matters – will be discussed, the forthcoming analysis emphasizes assessing the influence of the CFTC's Chairperson on rule-making. This emphasis is rooted in the notion of the bureaucratic discretion reviewed in Chapter 3, but done so as to further develop knowledge of this under-researched aspect of administrative agency rulemaking.

The efficacy of employing these selectivities in a rulemaking analysis is that those factors that permit or deny a (construed) regulatory approach compossibility with the (semiotic and extra-semiotic) milieu in which it is embedded can be identified and explored. For an approach to OTC commodity derivatives to be selected, or to continue to be retained, it must satisfy the conditions of compossibility. It should be noted, however, that compossibility does not denote the potential range of all possibility in this milieu, but, rather, comprises an "enforced selection" of a subset of its potential range. Nevertheless, while some regulatory approaches may be selected for their ostensible semiotic congruence (i.e., compossibility at the level of the discursive), these may not be *continually* validated by the extra-semiotic (e.g., not sustainably compossible at the level of the material). Yet, even if a material occurrence may seemingly negate the compossibility of a regulatory approach with a material reality, discursive strategies to mollify the apparent dissonance may be employed so as to grant the approach the *appearance* of compossibility with its extra-semiotic context. Examples of this can be seen above in the works of Sum (2015) and Heinrich (2015), wherein the economic arrangements largely responsible for financial crises are maintained after the crises, but are re-contextualized and re-articulated to give the appearance that the same arrangements are new, legitimate, and less risky (e.g. the post-Washington Consensus). A contemporary example of this comes from the 2016 US Presidential election, whereupon losing the popular vote, President Donald J. Trump intimated that he in fact won the popular vote because the margin of defeat comprised illegal, illegitimate votes.[97]

Analyzing OTC commodity derivative rulemaking also necessitates inquiring into the concept at the core of the CPE research program: a sedimented imaginary. As stated earlier in this section, the notion of sedimented should not be conflated with that which is material. Rather, this paper views that which is sedimented much in the same manner as a geologist would view a sedimentary rock: the rock has form and can influence other objects with which it comes into contact. But the properties of the rock indicate that its stable

[97] See *Trump claims millions voted illegally in presidential poll*, BBC News, 28 November 2016. Available at: https://www.bbc.co.uk/news/world-us-canada-38126438.

existence is a function of the continued deposition of matter, and that, should this process cease, the sedimentary rock is fully exposed to being weathered and eroded away (Haldar and Tišljar 2014: 122-144). Recall that a sedimented imaginary is neither fully separate from the discursive, nor capable of sustaining itself without its continued expression by individuals or groups. Thus, again, that which is determined to be sedimented will be viewed as if 'material', and subject to 'weathering and erosion', should its semiotic and extra-semiotic supports be contested.

In relation to OTC commodity derivative rulemaking, CPE's notion of imaginaries can be understood to mean the relatively stable lenses through which policymakers perceive their regulatory task (i.e., a guide to their rulemaking endeavors).[98] Imaginaries are formed under the influence of semiotic and extra-semiotic factors as a part of the co-evolving complexity reducing processes of semiosis and structuration subjected to variation, selection, and retention (Jones 2009: 2525f). Because imaginaries are, however, the ultimate product of the complexity reduction, they are not assumed to be more than incomplete representations of the objects to which they refer.

As will be discussed in more depth in Chapter 6, this thesis posits that CFTC policymakers were guided by a 'Dodd-Frank imaginary'. This imaginary was a simplified outgrowth of the Dodd-Frank Act's meaning as it pertained to the regulation of OTC derivatives. In short, the Dodd-Frank imaginary guided Commission officials towards developing OTC commodity derivative regulations which increased transparency into these financial products (i.e., through recordkeeping and reporting requirements) and reduced their attendant systemic risk (i.e., through clearing, margining, and position limits). As a

[98] In a non-CPE tradition, Beckert (2016) uses the notion of imaginaries to denote one's fictional expectations of the future: imaginaries are used to treat an imagined future *as if* it is real. Due to this, imaginaries have a degree of performative influence on the object to which the gaze of the imaginary is focused (Beckert 2016; Beckert 2013: 336f).

part of this application of CPE to the case of OTC commodity derivative rulemaking, this imaginary is engaged with throughout Part III of this study. In the event that the Dodd-Frank imaginary is refined, or evolves, during rulemaking, exploring those semiotic and extra-semiotic factors influencing such changes[99] is the final, yet nonetheless essential, component to examining CFTC officials' regulation of OTC commodity derivatives within a CPE theoretical framework.

CONCLUDING REMARKS ON CPE

This chapter has presented the theoretical framework of Cultural Political Economy, discussed selected theory literature, and has proposed an approach to CPE to guide the analysis of OTC commodity derivative rulemaking at the U.S. Commodity Futures Trading Commission between 2010 and 2016. As stated in this chapter's introduction, employing CPE in the study of OTC commodity derivative rulemaking can enable this research to fill the gaps in rulemaking literature that were identified in Chapter 3. Principally among these gaps is the need to provide an in-depth analysis of CFTC policymakers' crafting of OTC commodity derivative regulations in a manner that moves beyond (and addresses the limitations of) existing analytical approaches to rulemaking – a gap which can be filled by following the CPE approach proposed herein. Nevertheless, selecting the proper approach to CPE is imperative to fulfilling this task. Thus, in addition to 'practising' CPE, this project, as detailed above, utilizes the CPE research program's key concepts along similar lines to the reviewed work of Sum and Jessop (2013) and Mayblin (2016). Choosing this exact approach has the benefit of both grounding this project's analysis in a well-developed

[99] A process advocated for by (Jessop 2016: 2545) when the author discusses examining the intersection of imaginaries and policymaking.

analytical framework and providing the basis for a thorough and intellectually defensible exploration of OTC commodity derivative rulemaking.

Before advancing to the ensuing chapter and delving into a discussion of this project's methods and methodology, it is important to convey three noteworthy points regarding the use of CPE as a theoretical framework. First, as alluded to above, analyses grounded in CPE may ostensibly – and problematically – privilege semiosis over structuration, or, more broadly, the semiotic over the extra-semiotic (Staricco 2017: 339; van Heur 2010: 439). Although Jessop and Sum (2017) admirably argue that this phenomenon is neither inherently nor universally intrinsic to studies employing CPE, research that uses semiosis as the analytical entry-point can fail to analyze the interplay between semiosis *and* structuration over the course of inquiry. Therefore, to avoid this trap, and to assuage the criticisms of Staricco (2017) and van Heur (2010), the analysis of OTC commodity derivative rulemaking will move beyond its semiotic entry-point (i.e., the text of the rules) to incorporate both an analysis of semiotic *and* extra-semiotic considerations in regards to the analyzed regulations' construction.

Second, while Sum and Jessop (2013) review possible methodological procedures for operationalizing CPE, these progenitors of this theoretical framework do not propose a prescriptive methodological formulation. Conceivably, this could help explain the diverse ways in which CPE-informed studies have been carried out, as alluded to earlier in this chapter. Although Sum and Jessop (2013) suggest 'critical discourse analysis' as a potential methodological avenue, researchers Belfrage and Hauf (2015; 2017) posit the efficacy of utilizing 'critical grounded theory' in conjunction with CPE, and yet still other authors – including, on occasion, both Jessop and Sum themselves – utilize no specific methodological procedure in their CPE-related research (Sum and Jessop 2013; Levy and Spicer 2013;

Grubbauer 2014; Heinrich 2015; Mayblin 2016). This implies that there is flexibility in selecting a methodological procedure when employing CPE, but that a CPE-based analysis must, nonetheless, engage with both semiosis and structuration. Thus, as will be presented in the next chapter, an eclectic methodological procedure will be developed that will enable an analysis of *both* those semiotic and extra-semiotic factors conditioning OTC commodity derivative rulemaking.

Third, the CPE framework can also be criticized for the inert effect that its corresponding analyses have in producing social and political change. As noted by Tyfield (2015: 537-540), the issue with utilizing CPE for social, political, and economic analyses is that while the findings its application generates may enrich general topical understanding, the results do not "approach" an ultimate perspective on the matter; thus, leaving CPE analyses with limited *actionable* epistemic value. While the use of CPE in connection with this project does further understandings of rulemaking – specifically at the CFTC – given Tyfield's criticism, the results of this project are not overtly intended to effect change in the administrative regulatory process.

Chapter 5 – Data Collection and Methodology

INTRODUCTION

To analyze this project's research focus – *how CFTC policymakers constructed the regulation of OTC commodity derivatives between 2010 and 2016* – with the guidance of the CPE framework set forth in the preceding chapter, applicable data must be collected, and a methodological procedure for analyzing these data must be selected and followed, respectively. Moreover, through the development of the previous chapter's discussion of CPE in conjunction with the case of OTC commodity derivative rulemaking, four sub-research questions can now be generated. These questions, including the central research question, are as follows:

- *How did CFTC policymakers construct the regulation of OTC commodity derivatives between 2010 and 2016?*
    - *What imaginaries pertaining to the regulation of OTC commodity derivatives were present during rulemaking?*
    - *To what regulatory considerations did CFTC policymakers grant significance during rulemaking?*
    - *Why were certain regulatory approaches selected and retained by CFTC policymakers when rulemaking, and what influenced this selection and retention?*
    - *Did the imaginaries change during the OTC commodity derivative rulemaking process? If so, how?*

To answer the above questions, an in-depth account of the development of the CFTC's OTC commodity derivative regulations between 2010 and 2016 will be undertaken. As stated earlier in this thesis, such an endeavor has not been pursued in previous research. Thus, this project makes novel contributions to research on OTC commodity derivative rulemaking at the CFTC, specifically, and to scholarship on administrative agency rulemaking, more broadly. Moreover, as this instant research is guided by a CPE theoretical framework, analyzing rulemaking from this perspective both advances CPE into a novel domain (i.e., rulemaking) and contributes, in a unique manner (i.e., through the employment of CPE), to current academic understandings of this administrative process.

Given the nature of the previously articulated research questions, and the CPE approach taken herein, this project on OTC commodity derivative rulemaking constitutes qualitative research. Qualitative data, such as documents and interviews, were collected for purposes of analysis. As elaborated below, the qualitative data for this research were selected based on their applicability to the case study of OTC commodity derivative rulemaking at the CFTC between 2010 and 2016. Furthermore, congruent with the nature of these data, qualitative methods are used to guide the analysis towards answering the research questions and, thus, to provide a thorough account of OTC commodity derivative rulemaking.

Data selected for this study specifically pertain to the Commission's rulemaking for the forward contract exclusion and for commodity (trade) options. Together, these rule-makings comprise the CFTC's determination (i.e., definition) of which OTC commodity derivatives would be regulated as 'swaps' and, thus, subject to the Dodd-Frank regulatory post-trade infrastructure.[100] This combined rulemaking sequence, in its multiple stages, will serve as the focal point for the instant study's analysis.

To concisely summarize, the forward contract exclusion provides a framework for determining which OTC commodity derivatives can be considered regulatable 'swaps' and which are non-regulatable forward contracts. Meanwhile, the rules for commodity (trade) options distinguish between commodity options that are to be regulated as 'swaps', and trade options that are to constitute an exemption from some or all regulation as 'swaps'. In

[100] As will be discussed in Chapter 6, this infrastructure includes reporting and recordkeeping requirements, mandatory clearing, margin requirements for derivative instruments that would be regulated, and, to a certain extent, position limits.

the case of trade options, the rule(s) for commodity (trade) options grant(s) an exemption (i.e., the 'trade option exemption') to those OTC commodity derivative contracts containing an option – thus, qualifying as regulatable 'swaps' (i.e., commodity options). To so qualify, however, the option strictly must be used for commercial purposes and result in the physical delivery of the underlying commodity upon the exercise of the contracted option (i.e., therefore exempting them as trade options).

The data relating to rulemaking for the forward contract exclusion and commodity (trade) options include their associated promulgated rules and corresponding comment letters. Taken together, the rules and comment letters comprise the totality of the formal documentation of rulemaking. Since these two rulemaking areas included the production of advance notices of proposed rulemaking, proposed rules, final rules, and revisions to the final rules, rule and comment related data from each of these stages are included in this study's dataset. Additional data from policymaker speeches, policymaker Congressional testimony, agency meeting transcripts, and no-action letters[101] relating to the two rulemaking domains has also been collected for this research into the regulation of OTC commodity derivatives. Each of these data are publicly available through either the U.S. Federal Register or through the CFTC, and are readily accessible online.

Furthermore, to complement and enrich the rule-related data just referenced, interviews with Commission officials engaged in the development of OTC commodity derivative regulations were conducted. Although the principal source of data for the analysis of OTC commodity derivative rulemaking are the rule-related documents, complementing these data with interviews of CFTC officials serves an important function.

[101] A letter written by an administrative agency's staff for outside stakeholders notifying these parties that the agency (or a division within the agency) will not proceed with legal or regulatory enforcement of one, or more, regulation(s).

Namely, such interviews can provide insightful perspective on potentially significant aspects of Dodd-Frank era CFTC rulemaking which might not otherwise be expressed in the rules, comment letters, or other rule-related data.

Answering the questions of this research effort requires that a methodological procedure to operationalize the overarching CPE theoretical framework be developed to guide the analysis of the collected data. As stated in the previous chapter, because CPE and its related scholarship do not prescribe a singular methodological approach, the procedure that will be elaborated on herein is eclectic. Broadly speaking, the methodological procedure that is developed will guide the analysis of this research project's collected data to identify and assess the interacting and co-evolving semiotic and extra-semiotic factors which conditioned the construction of OTC commodity derivative regulations; thus, providing an answer to this study's central research question.

To expand on this discussion of data collection and methodology, this chapter has two sections. The first section – on data collection – will discuss the selection of data sources, as well as data collection methods. Additionally, a few reflexive remarks will be made regarding the selection and collection of these data. The second section – on methodology – will begin by critically enunciating the analytical grounding of the methodological procedure to be followed in the forthcoming rulemaking analysis. Finally, a detailed presentation of the precise methodological procedure followed in the analysis of OTC commodity derivative rulemaking data will be set forth.

DATA COLLECTION

Data Selection

As indicated above, the principal basis for selecting data is their relevance to this research's focus – OTC commodity derivative rulemaking at the CFTC between 2010 and 2016. Beyond this general criterion, the features of administrative agency rulemaking (i.e., its rules and comment letters) should be seen as the well-spring from which data are selected. As such, the primary sources of data relating to formal rulemaking are rules adopted by the relevant government agency and the rules' attendant comment letters.

For OTC commodity derivative rulemaking, the rules selected for this research project include those for the forward contract exclusion and those for commodity (trade) options. These rules determine (define) which OTC commodity derivative instruments will be subject to regulation as a 'swap'. As it pertains to the forward contract exclusion, those rule releases issued by the CFTC that will be analyzed in this thesis are as follows: (1) the August 20, 2010 advance notice of proposed rulemaking, (2) the May 23, 2011 proposed rule, (3) the August 13, 2012 final rule, (4) the November 20, 2014 proposed interpretive guidance, and (5) the May 18, 2015 final interpretive guidance. With regard to the regulation of commodity (trade) options, the to-be-analyzed rule releases are: (1) the September 28, 2010 advance notice of proposed rulemaking, (2) the February 3, 2011 proposed rule, (3) the April 27, 2012 final rule, (4) the May 7, 2015 proposed rule for trade options, and (5) the March 21, 2016 final rule for trade options. Comment letters of outside, interested parties on each applicable rule-making are also included as selected data.

To provide additional richness to the data on the above rule-makings, CFTC policymaker speeches, Congressional testimony, agency meeting transcripts, and no-action letters relating to the two rulemaking areas are included in the dataset. These data sources will provide further perspective on the perceptions of policymakers concerning the regulation of OTC commodity derivatives. As it specifically pertains to policymaker speeches, only those speeches between 2010 and 2016 that relate to OTC commodity derivative rulemaking are selected. Nevertheless, since some applicable speeches may not overtly address OTC commodity derivative rules, speeches that refer to the regulation of 'commodity options', 'trade options', 'optionality', and 'forward contracts', as well as those referencing 'exclusion', 'exemption', 'end-users' or 'commercial users or participants' in the context of OTC commodity derivatives, will qualify for selection into the instant study's dataset.[102] Moreover, because the CFTC only possesses records of public speeches given by commissioners and chairpersons, the selection of speeches will be limited to this policymaker cohort.

Table 1, below, provides a synopsis of the document types, their criteria for selection, and their source of access for OTC commodity derivative rule-related data used in this project. Furthermore, Appendix B lists all such rule-related documentation drawn on in this paper's analysis. This can be found after the reference pages.

[102] As a heuristic, these terms serve as signifiers of a discussion pertaining to OTC commodity derivative instruments and marketplace participants.

Table 1 – Synopsis of Documentation		
Document Type	**Criteria for Selection**	**Source of Access**
Rule	*Advance notice of proposed rulemaking, proposed rule, and final rule for determining which OTC commodity derivatives would be regulated (2010-2016)*	CFTC Website and/or Electronically from Federal Register
Comment Letter	*Comment letters on selected OTC commodity derivative rules (2010-2016)*	CFTC Website and/or Electronically from Federal Register
Policymaker Speech	*Given by a CFTC chairperson or commissioner; either directly relating to the selected OTC commodity derivative rules or referencing 'commodity options', 'trade option', 'optionality', 'forward contracts', and 'exclusion', 'exemption', 'end-users' or 'commercial users or participants' of commodity derivatives (2010-2016)*	CFTC Website and/or Electronically from Federal Register
Agency Meetings	*Transcripts of CFTC meetings relating to rulemaking for the forward contract exclusion and commodity (trade) options (2010-2016)*	CFTC Website and/or Electronically from Federal Register
Congressional Testimony	*Made by CFTC policymakers concerning the selected OTC commodity derivative rules (2010-2016)*	Website for Congressional Records
No-Action Letter	*No-action letters for the selected OTC commodity derivative rules (2010-2016)*	CFTC Website and/or Electronically from Federal Register

The final source of data to be utilized in this paper's analysis are in-person interviews with CFTC officials. While the exact details of the methods for selecting interview participants and collecting interview data will be explored in the next sub-section, in general, interviews were sought with CFTC officials who worked at the CFTC between 2010 and 2016. Moreover, interviews were principally sought with CFTC commissioners and those employees who worked directly on OTC commodity derivative regulatory issues (as evidenced by their names on related agency rules, letters, or policy statements). The inclusion of interview data into the broader rulemaking dataset should be viewed as complementary in nature. As noted above, the focal point of analysis are the aforementioned OTC commodity derivative rules, and complementary data, such as those derived from interviews, serve to provide additional context, depth, and insight into the perceptions of CFTC policymakers when they developed these rules.

Data Collection

The collection of all data and information for rulemaking on both the forward contract exclusion and commodity (trade) options, including the rule-makings' corresponding comment letters, was done through online governmental sources; most prominently, the CFTC's website.[103] All information relating to these two rulemaking areas is publicly available and is posted online by the Commission. As such, each iteration of the rules for the forward contract exclusion and for commodity (trade) options were collected through their respective rulemaking pages on the CFTC's online site. Additionally, the comment letters associated with each of these rule-makings were collected from these same pages – repositories known as 'comment files'. With regards to CFTC policymaker speeches, Congressional testimony, agency meeting transcripts, and no-action letters, these items are similarly found on the Commission's webpage or, in the case of the Congressional testimony, through Congress' website.

As it pertains specifically to policymaker speeches, those speeches that were given between 2010 and 2016, and that directly related to rulemaking for the forward contract exclusion or commodity (trade) options, were collected as a part of this study into the regulation of OTC commodity derivatives. To determine these speeches' potential applicability to this project's research, a keyword search using the following terms was preliminarily undertaken: 'commodity options', 'trade options', 'optionality', 'forward contracts', 'exclusion', 'exemption', 'end-users' or 'commercial users or participants'. For

[103] See https://www.cftc.gov/.

those speeches that included one or any combination of these terms, the speech was then read to ascertain its relevance to issues involving OTC commodity derivative regulation.

Interviews were also conducted as a part of this research project. Beginning July 2017, emails were sent to over a dozen potential interviewees whose work was determined to have involved the regulation of OTC commodity derivatives between 2010 and 2016. The determination of an interviewee pool involved a couple of criteria, including: (1) if the individual was a CFTC commissioner between 2010 and 2016, or the individual was referenced in a policy document relating to the regulation of OTC commodity derivatives which dated from 2010 to 2016 and (2) if the interviewee's contact information was publicly available. Those individuals in this pool were then contacted via email to inquire into their interest and availability to discuss their recollections of OTC commodity derivative rulemaking for either a face-to-face interview in Washington, D.C. or a telephonic interview. For those that responded, interview dates were arranged. And, for those who did not respond, subsequent attempts at email contact were made. (Of note, the size of the potential interviewee pool was not large to begin with, given the above conditions.) Included with the interview request email were an attached consent form (see Appendix C) and interview information sheet (see Appendix D).

While the above criteria for determining which individuals would be contacted for an interview were developed to capture interviewees whose work involved decision-making on rules for OTC commodity derivatives (e.g., commissioners and other senior-level policymakers), it should be acknowledged that these criteria may prompt concerns about bias in the selection of interviewees. Given the above criteria, not all individuals who worked on OTC commodity derivative rulemaking were interviewed. In several instances, either contact information was not publicly available or the prospective interviewee(s) never responded to this researcher's inquiries. Thus, potentially important recollections on the rulemaking process may have been omitted from the interview dataset. Nevertheless, this should not be viewed as a significant limitation to this research project for two reasons: (1) the analytical focus of this study is the formalized rulemaking process, and not solely or even predominantly the recollections of (former) policymakers; and (2) the interviews that were conducted are, thus, only used to complement the data from this formalized process by being sources of information that the formal data on this process (i.e., rules and comment letters) may not contain.

In total, 7 interviews were conducted. Five of the interviews were face-to-face, held in either the offices of the interviewees or in a public setting in the Washington, D.C. area between October 1, 2017 – October 10, 2017. The remaining two interviews were conducted telephonically at later dates.[104] The interviews were semi-structured, in that they were guided by a set of questions relating to OTC commodity derivative rulemaking, but also broached related topics as the interview unfolded. The interview questions sought to explore the interviewees' experiences, views, and recollections on the regulation of OTC commodity derivatives. Each interview was audio-recorded with concomitant notes taken.

At the time the interviews were held, the consent forms were signed and returned to this author; thus, ensuring the participants' informed consent. Notably, the interviewees gave, or withheld, their consent to both the transcription of the interview by a third-party and to the use of the interviewee's name in this thesis.[105] After the interviews were

[104] Although additional telephonic interviews were sought, no further prospective interviewees responded to interview requests.

[105] Five interviewees – constituting 6 of the interviews – gave their consent to have their interviews transcribed. The sixth interviewee did not return the consent form, although subsequent efforts were made to have the form remitted. Thus, this interview was not transcribed and data from it will not be used in this thesis. (This author, however, still possesses the audio recording of the interview.) Additionally, only 2 of the interviewees gave their consent to have their names used.

conducted, both emailed ‘thank you’ notes and posted ‘thank you’ cards were sent to the interviewees who partook in face-to-face interviews. The audio recordings of the interviews, for which consent to do so was obtained, were transcribed by a third-party. The transcriptions are available upon request with interviewee consent.

Ethical considerations relating to the interviews should also be mentioned here. For instance, prior to embarking on the interview fieldwork, a formal research ethics form was completed, submitted, and approved by the University of Edinburgh. Additionally, as elaborated in this university-provided pre-clearance form and in the interview information sheet given to the interviewees (see Appendix D), ethical guidelines pertaining to the handling and use of the interview data were stated and followed. Most importantly among these was the disclosure that for those participants who wanted to remain anonymous – should their interviews have been used in this thesis – anonymity could not be guaranteed, but reasonable efforts would be made to anonymize the interview data. Following Saunders et al. (2015: 134) for the group of participants wishing to remain anonymous, non-essential interviewee details have been altered.

A final ethical consideration stems from what may be thought of as a power imbalance between the (relatively elite) interviewee and the student interviewer.[106] While a power imbalance may nominally exist insofar as knowledge of and experience in OTC commodity derivative rulemaking at the CFTC are concerned, in the interview space, an evident power imbalance was not perceived by this interviewer. Furthermore, this researcher was not your typical student novitiate with regards to OTC commodity derivatives, having previously worked in a regulatory compliance capacity with such instruments in the legal office of a U.S.-based energy company. Nevertheless, if such an

[106] See Smith (2006) for a critical discussion of power relations in the (elite) interview space and how they should not be assumed to be ubiquitous in such space.

imbalance existed, its effects would be tempered from significantly influencing this project's analysis because of the use of the interviews as a secondary, complementary source of data and information.

Regarding the experience of holding these interviews, a few points are worth noting. First, although this researcher did partake in a one-day qualitative interview training course at the University of Oxford in May 2017, these were the first research interviews the researcher had conducted. Thus, possibly due to nerves, the intra-interview prompts for the first two interviews were not as analytically crisp – and capable of yielding insightful responses – as those in later interviews. Second, and disappointingly, while the contact information of other potential interviewees was procured from interview participants, and attempts to contact the potential interviewees were made, this 'snow-ball' method did not yield any additional interviews. Third, and finally, a significant personal expense was incurred to visit Washington, D.C. for the 10-day period during which face-to-face interviews were conducted. Because of the high cost of this visit, this researcher was neither able to return to Washington, D.C. nor visit any other city where potential interviewees (former CFTC officials) resided. In short, the high cost associated with holding face-to-face interviews limited the availability of such interviews; hence, in part, the relatively small number of face-to-face interviews.

METHODOLOGY

As stated in the introduction to this chapter, this section develops the methodological procedure that will guide the analysis of OTC commodity derivative rulemaking. This section of the chapter is segmented into three subsections. The first subsection sets out the foundations for, and implications of, the methodological procedure that will be followed in the CPE-informed analysis of the case of OTC commodity derivative rulemaking. Then, the second subsection will situate the upcoming analytical chapters of this thesis within the context of a case study. Finally, the third subsection will present the complete methodological procedure, linking it with CPE, the theoretical framework adopted herein for the analysis of OTC commodity derivative rulemaking.

Foundations of the Research Methodology for the Case Study of OTC Commodity Derivative Rulemaking

The research methodology for this inquiry into OTC commodity derivative rulemaking is founded upon the CPE theoretical framework put forth in the preceding chapter. As such, this methodology seeks to operationalize a CPE approach to the analysis of rulemaking; using its analytical lenses to explore and assess the construction of OTC commodity derivative regulations. Flowing from the core of CPE, the hallmark of this approach is the analysis of *both* semiosis (i.e., the semiotic) and structuration (i.e., the extra-semiotic), as well as how these intersected to condition rulemaking. Any attempt to operationalize CPE for research purposes must, as noted by Thompson and Harley (2012: 1377f), examine the relationships between discourse (i.e., the semiotic), actors, institutions, and other extra-semiotic “conditions and constraints” when formulating explanations and providing evidenced-based, analytical insight. The manner in which the semiotic and extra-semiotic are conceptualized for this rulemaking study has been explained in Chapter 4.

Since this study approaches the analysis of OTC commodity derivative rulemaking from a CPE perspective, it is *broadly* deductive in nature. A deductive approach to analysis refers to the use of a pre-existing (or predetermined) theoretical framework through which to view and assess the collected data (Woiceshyn and Daellenback 2018: 185; Azungah 2018: 391). Generally speaking, this entails moving an analysis from the conceptualizations advanced by the framework (or theory) to the particular phenomena observed in the data.

In relation to this research project, this means that CPE is utilized for initiating and guiding the exploration and analysis of the rulemaking case. (It should be noted, however, that while some deductive methods seek to test specific theoretically derived hypotheses, the approach taken herein does not attempt to directly formulate and tests theory-related propositions.)

While the case of OTC commodity derivative rulemaking is analyzed from the perspective of CPE, and, therefore, implies a deductive analytical approach, as stated immediately above, this implication must be qualified as *broadly* deductive. This is because a CPE-informed analysis necessarily implicates deductive *and* inductive research "moments" (Belfrage and Hauf 2015; Belfrage and Hauf 2017). For instance, in the analysis of CPE's semiosis arm – or, of the semiotic – the methodological procedure (as detailed below) dictates an examination of the analyzed rule-making's text followed by an exploration and assessment of the semiotic (discursive) factors (or influences) that conditioned this text. Such a part of the procedure implies induction (Azungah 2018). Furthermore, regarding CPE's structuration arm – or, of the extra-semiotic – the specific influence of, for example, a CFTC policymaker on the construction of a regulation is inferred from the collected data as based on the individual's recorded actions (or imposed policy preference) relating the regulation's development. Nevertheless, the capacity for this actor to influence rulemaking is conceptualized – as done in Chapter 4 – and viewed through the lens of CPE's agential selectivity; implying deduction. Thus, while this study of OTC commodity derivative rulemaking has inductive analytical moments, its employment of CPE to guide the overall analysis also renders it *broadly* deductive in nature.

In light of the foregoing discussion, it is important to consider the issues of the internal and external validity of the instant study as well as its reliability. Regarding internal validity, or correctly fulfilling the study's investigation, this has been achieved by the rigorous data selection and collection procedures explicated in the previous section of this chapter, and will be maintained through the consistent use of diverse sources of data in informing the analysis of OTC commodity derivative rulemaking (Malterud 2001; Maxwell 2005). With regard to external validity, or the generalizability of the study's findings, this will be achieved on a conditional basis. As a single-unit qualitative case study that is *broadly* deductive (as defined immediately above), the results of this project are not intended to confer universal knowledge that can be extrapolated in full to each and every rulemaking case. (To be sure, there will be instances wherein the semiotic and extra-semiotic factors that are explored in the instant study weight wholly differently in conditioning the construction of other regulations.) Rather, generalizability is attained as (1) the study provides "analytic generalizations" (Firestone 1993; Yin 2009) that can be used to inform, shape, and guide future (CPE-based) rulemaking research and (2) the inquiry's findings can speak to phenomena of similar rulemaking cases, such as of other (CFTC) rulemaking sequences during the Dodd-Frank era. Finally, as it relates to the reliability of this study's findings, the theoretical commitments adopted for this project have been explicated and an eclectic methodological procedure is developed and followed so as to ensure that should this research into OTC commodity derivative rulemaking need to be reproduced, another researcher who ascribes to these same commitments and follows the same analytical procedure on the same selected data will reliably reproduce the results arrived at herein (Yin 2009).

A Case Study for OTC Commodity Derivative Rulemaking

In analyzing this paper's central research focus of how CFTC policymakers constructed the regulation of OTC commodity derivatives between 2010 and 2016, as well as the related sub-research questions listed at the beginning of this chapter, the various chapters of Part III of this thesis will present a qualitative case study of OTC commodity derivative rulemaking at the CFTC from 2010 through 2016. As the regulation of these financial instruments was codified through the forward contract exclusion and commodity (trade) options rule-makings, this case study will comprise an in-depth, CPE-informed analysis of these rule-makings in each of their stages. Moreover, this account will follow an eclectic methodological procedure which guides the CPE-backed analysis of OTC commodity derivative rulemaking.

Presenting OTC commodity derivative rulemaking in the form of a qualitative case study has several benefits. First, such a presentation enables an enunciation of an intensive account of the regulations' development. The result being that a case study facilitates analytical depth (Widdowson 2011: 26). Second, utilizing a case study is efficacious because its structure necessarily allows for a straightforward combination of multiple data sources (e.g., rules, comment letters, interviews) to inform the study's analysis (Yin 2009). This ensures that the study is robustly grounded and has empirical support. Third, a case study offers a certain ease in the presentation of the research material drawn upon. Thus, it conveys information to the reader in an accessible manner. Fourth, and finally, the use of a case study can prove effective in advancing the theoretical framework – CPE – into research on administrative agency rulemaking. As a result, this research project could serve as a guidepost for future CPE-informed scholarship on rulemaking as well as serving to enrich existing CPE literature.

A Methodological Procedure for the Analysis of OTC Commodity Derivative Rulemaking

This subsection of the chapter details the methodological procedure that will be followed to guide a CPE-informed analysis of the case study of OTC commodity derivative rulemaking.

As mentioned above, and as will be further explored below, the rulemaking analysis begins by engaging the rule-makings themselves, and the regulatory approaches that they convey, before exploring, as CPE necessitates, the semiotic and extra-semiotic factors that interacted and co-evolved to condition these rule-makings. This will also shed light on the Dodd-Frank imaginary, and whether its constitution varied. The factors conditioning the rule-makings, as well as the Dodd-Frank imaginary, are ascertained by analyzing the instant study's collected data as informed by the CPE framework put forward in the preceding chapter. Through the eclectic methodological procedure set out below, the CPE-based framework for OTC commodity derivative rulemaking is operationalized so as to allow for the central and sub-research questions to be answered. [107]

The first item to be discussed concerning the methodological procedure followed in this research project relates to the case study's structure. The text of the rule-makings for both the forward contract exclusion and the commodity (trade) options, in each of their iterations, will serve as the entry-point for analysis. This has been chosen as the analytical starting point because they provide the content of the actual regulations for OTC commodity derivatives that CFTC policymakers have codified, and because these are legally enforceable texts that have been formally reviewed, agreed to, and implemented by Commission policymakers.

The second item relates to the order of analysis. Given that rulemaking is subject to the processual strictures of the Administrative Procedure Act reviewed in Chapter 2, the analysis of forward contract exclusion and commodity (trade) options regulations will begin with the earliest rulemaking event (i.e., the advance notices of proposed rulemaking) and trace the regulations' development through time. The rule-makings that will be analyzed

[107] The entirety of the below rulemaking analysis was done manually, or by hand. Corresponding hand-written and electronic notes were taken as the analysis was conducted.

will be presented sequentially. Setting out OTC commodity derivative rulemaking in a linear manner will aid with both an easy identification of how policymakers constructed regulations for OTC commodity derivatives at each rulemaking juncture (e.g., for the notices of proposed rulemaking and final rulemaking) and with an illumination of changes to these officials' regulatory approaches as OTC commodity derivative rulemaking unfolded.

To these points, identifying and understanding alterations to the regulatory approaches towards OTC commodity derivatives taken in the rules serves to provide crucial insight into answering this study's central and sub-research questions. Given that this project seeks to examine how CFTC policymakers constructed the regulation of OTC commodity derivatives, those instances in which agency officials changed their regulatory approach – as conveyed in the text of a rule-making – are assumed to reflect variation in the semiotic and/or extra-semiotic supports underpinning a selected and/or retained approach towards regulation (to use the vocabulary of CPE). Those occasions in which this occurs provide pivotal openings or portals for analyzing what (and how) semiotic and extra-semiotic factors influenced such modifications and, thus, the construction of an updated regulatory approach.

The case study of OTC commodity derivative rulemaking will begin with an exploration of the advance notices of proposed rulemaking for both the forward contract exclusion and for commodity (trade) options. The two releases that are specifically explored are the CFTC's notice concerning the definition of a 'swap' (a notice serving as the predecessor to the proposed forward contract exclusion) and its promulgation regarding agricultural swaps (a notice which served as the predecessor to the proposed "Commodity Options" rule). Because these advance notices are limited to recitals of delegated regulatory authority, an overview of the administrative agency's prior related regulatory efforts, and a series of questions soliciting data and information from prospective rule stakeholders and other outside parties, the analysis of these advance notices is more restricted in nature than its succeeding counterparts (e.g., the proposed rules, and the final rules). The result of this being a simple presentation of these two advance notice releases followed by an engagement of their content and an assessment of the milieu in which the notices were developed. With regards to the engagement of the two advance notices' content, this will be done by exploring the potential significance of the releases' genre,[108] style,[109] and embedded discourses (i.e., its content).[110] As it relates to an exploration of the pre-proposal milieu, this information is generated by analyzing the main themes that emerged during a formal intra-agency rulemaking meeting in connection with the promulgation of the advance notices.

The chief contribution of this discussion of the advance notices to the overall analysis is that it explores the key considerations informing Commission policymakers' pre-proposal OTC commodity derivative rulemaking efforts. In doing so, this chapter ascertains what CFTC policymakers viewed as significant and necessary to rulemaking as they began determining which OTC commodity derivatives would be regulated under Dodd-Frank. The data used here include the two advance notices, the transcript from the CFTC's internal Agricultural Advisory Committee's meeting relating to the issuance of the advance notices of proposed rulemaking, and interview data.

Continuing to the next stage of rulemaking, analyses of the proposed forms of the "Commodity Options" rule and the forward contract exclusion of the 'swaps' definition rule

[108] Genres are the mediums through which discourses can be accessed (Fairclough 2013: 179).
[109] Styles are understood to be expressed ways of being (Taylor 2004: 437; Fairclough 2003: 23).
[110] The term 'discourse' can be defined in slightly different ways. Generally, however, the term is understood to mean "language use in speech and writing" (Fairclough and Wodak 1997: 258). Some researchers, such as Fairclough (2005: 916), extend the reach of this definition to include "visual images and 'body language'."

are conducted. In beginning the CPE-backed analysis of these two proposed rules, an overview of the political and institutional context in which they were crafted is first set out. (This segment of the chapter draws on interviews, newspaper articles, and select policymaker speeches.)

Shifting to the analysis of the construction of the two proposed rule-makings themselves, their regulatory content serves as the entry-point for the CPE-informed inquiry. Beginning with semiosis, in analyzing the semiotic dimensions of the two proposed rule-makings, their content is first reviewed and distilled to its core regulatory function(s) before close attention is paid to the intertextual[111] and interdiscursive[112] features of these releases' regulations. This is done to identify the discursive inputs into (and discursive influences on) the regulations' contents' construction, be they the recontextualization of existing regulatory precedent, the use of language directly from the Dodd-Frank Act, or the appropriation of the commentary of external agency actors as procured through comment letters. The exact procedure for establishing discursive influence on the proposed regulations' content (and, thus, its regulatory effect) is to examine them for either explicit or implicit references to other textual (or discursive) sources.[113] In regard to the former, an explicit link to another textual source (i.e., a comment letter) can be established by identifying policymakers' citation of this source as informative to the regulation (e.g.,

[111] Intertextuality pertains to the way in which "social and historical foundations are combined or modified by texts, and how discourses and genres blend together" (Titscher, Meyer et al. 2007: 150). Put differently, intertextuality is the process by which the development of a text is done by drawing on other texts (Fairclough 1992; see Evans-Agnew).

[112] Interdiscursivity refers to how a text is constituted from different, yet occasionally overlapping, discourses and genres (i.e., mediums through which discourses are expressed, such as a policy memo or central bank minutes) (Fairclough 1993: 138).

[113] A similar, though differently named, approach is enunciated in, and followed by, Rashin (2020) in the author's assessment of comment letter *influence* on regulatory content. Nevertheless, while alike in terms of procedure (i.e., seeking to link speech acts with rule text), adopting the 'intertextual' and 'interdiscursive' nomenclature for the analysis of the rule-making's pertinent discourses as done herein stems from its harmonious fit with assessing CPE's semiosis arm as posited by Sum and Jessop (2013).

adopting regulatee language from a comment letter to inform a specific regulation, and citing the letter as the impetus for as much), and to the latter, an implicit link can be determined wherein the content of a regulation reflects – or even precisely mirrors – a (or the) discourse(s) advanced by a related source (e.g., the language of the overriding statute, the articulated regulatory vision of an agency's chairperson, the industry practices depicted in a regulatee's comment letter, or the existing regulatory approach for a similar and/or related derivative product).

Moving from this entry-point, consideration is then given to CPE's structuration arm. Here, the CPE-posited lenses of the four selectivities – structural, discursive, technological, and agential (as conceptualized in Chapter 4) – are used to explore the selected data for the proposed rule-makings. Through these lenses, extra-semiotic factors influencing rulemaking are inferred from the referenced data, and an assessment of how these factors interacted and co-evolved with their semiotic counterparts to condition the selection of the regulatory approach to OTC commodity derivatives constructed during proposed rulemaking is carried out.

Additionally, the analysis of proposed rulemaking engages with the Dodd-Frank imaginary (as formally posited in Chapter 6), and discusses how this imaginary related to the initial regulatory approach to OTC commodity derivatives taken by Commission policymakers during this rulemaking period.

The CPE-informed analysis of the proposed forward contract exclusion and the proposed rule for commodity (trade) options thus contributes to an understanding of the main factors (and actors) conditioning the proposed rule-makings. The data sources contributing to this part of the case study include the two proposed rule-makings, associated comment letters, policymaker speeches, transcripts of the agency meetings for proposed rulemaking, Congressional testimony of Commission officials, and interviews[114] with CFTC policymakers.

Analyzing the final rule-makings for the forward contract exclusion and for commodity (trade) options from the standpoint of CPE will approximately follow the same structure as that stated above for the proposed rules. This analysis, thus, engages the semiotic dimensions of the two final publications before considering the influence of extra-semiotic factors on the construction of the codified regulatory approaches to OTC commodity derivatives contained therein. Because this final rulemaking stage – one characterized by Paroske (2011: 49) as involving "interpretive argumentation" – requires that policymakers critically address some outside party comment letters written in response to the promulgation of the proposed rule-makings, those arguments considered by CFTC policymakers to be substantive to final rulemaking[115] are presented and examined in conjunction with the chapter's broader analysis of semiosis (as described above). Together, the uncovered semiotic and extra-semiotic factors are then used to explain the regulatory construction for OTC commodity derivatives at this stage of rulemaking, and why the adopted approaches to regulation were selected and retained (to use the vocabulary of CPE). Furthermore, these factors will also be used to explicate any refinement that took place to the Dodd-Frank imaginary during final rulemaking.

This analysis provides insight into how policymakers constructed OTC commodity derivative regulations during final rulemaking, and how the Dodd-Frank imaginary was refined during this period. The data used to inform this portion of the case study's analysis

[114] Aside from transcribing the interviews and conducting a basic content analysis thereon, no formal methodological procedure has been applied to the interview data as the interviews are only used in a supportive capacity in this research.

[115] This is determined by whether or not agency officials directly reference (and/or address) an argument from a specific comment letter.

come from the following sources: the two final rule-makings, their related comment letters, policymaker speeches, transcripts of the agency meetings for final rulemaking, and Congressional testimony of Commission officials.

In the last portion of this case study, the revisions to the forward contract exclusion and to the commodity (trade) options rule-makings are assessed from the perspective of CPE. These rule-makings reinterpreted what OTC commodity derivative transactions would be included under the regulatory umbrella of the Dodd-Frank Act. Because rulemaking for these regulatory areas involved both proposed and final forms, the analyses at these two rulemaking stages follow, as set out above, the same procedures for analyzing proposed and final rule-makings. Through analyzing these culminating or capstone rulemaking events, two key issues are presented: (1) the changing way in which CFTC policymakers constructed the regulation of OTC commodity derivatives, and (2) how the existing Dodd-Frank imaginary was subject to contestation and evolved to accommodate this new approach to regulation. The following data sources were used for this concluding part of the case study: the four combined rule-makings (2 proposed, 2 final), corresponding comment letters, policymaker speeches, transcripts of the agency meetings relating to the regulatory revisions, Congressional testimony of Commission officials, CFTC no-action letters, and interviews with Commission policymakers.

The methodological procedure set forth herein presents how a CPE-informed analysis of the case study of OTC commodity derivative rulemaking will be conducted in the upcoming analytical chapters. This eclectic approach initiates the analysis of OTC commodity derivative rulemaking at the level of the rule-makings, and examines the semiotic and extra-semiotic factors – as ascertained from the data collected and as conceptualized through the grounded CPE commitments enunciated in Chapter 4 – that interacted and co-evolved to condition their construction. These same conditioning factors are also used to examine stability in, or changes to, the Dodd-Frank imaginary as the case study follows the progression of the analyzed multi-year rulemaking sequence. In carrying out this exercise, the CPE-backed analysis develops the requisite evidence and information for answering the instant study's central and sub-research questions. How policymakers constructed the regulation of OTC commodity derivatives will, thus, wind-up being established.

PART III - THE CASE OF OTC COMMODITY DERIVATIVE RULEMAKING, 2010-2016: ANALYSIS AND DISCUSSION

PREFACE

Having presented and critically discussed this project's theoretical framework and methodological approach, this thesis turns to an analysis of the case of OTC commodity derivative rulemaking and a discussion of this study's findings. In Part III of this study, how CFTC policymakers constructed their regulation of OTC commodity derivatives between 2010 and 2016 will be explored. To support this endeavor, the case of OTC commodity derivative rulemaking is analyzed from the perspective of the CPE framework outlined in Chapter 4, with the support of the methodological procedure developed in Chapter 5. Analyzing the rulemaking case study in this manner serves to answer the central research question examined herein and will help to develop a thorough account of OTC commodity derivative rulemaking at the CFTC from 2010 through 2016. This analysis represents both a contribution to a previously unresearched domain of OTC commodity derivative rulemaking in the Dodd-Frank era – i.e., CFTC rulemaking defining the OTC commodity derivatives that would be regulated under Dodd-Frank – and a novel, CPE-based contribution to administrative agency rulemaking literature.

To assist with answering the stated central research question (along with the sub-research questions) and in developing this CPE-informed study, the analysis of the case of OTC commodity derivative rulemaking is structured as follows.

In prefacing the analysis and discussion of the 2010 through 2016 rulemaking period, the first chapter of this Part, and the sixth chapter of this thesis, reviews the CFTC's historical involvement with the regulation of OTC derivatives, broadly, and OTC commodity derivatives, specifically. This review traces OTC (commodity) derivative regulatory developments from the time of the agency's establishment in 1974 until the Dodd-Frank

Act's enactment in 2010, and makes particular reference to the pivotal issue(s) that the Commission had faced in regards to regulating OTC (commodity) derivatives up to 2010, as well as introduces the 'Dodd-Frank imaginary' as a crucial guide for CFTC policymakers during Dodd-Frank era rulemaking as well as Chairperson Gary Gensler, who would first lead the Commission in implementing the Dodd-Frank Act.

Chapter 7 discusses the two advance notices of proposed rulemaking that would serve as the foundational components to the first two proposed OTC commodity derivative rules. The two releases are the CFTC's notice concerning the definition of a 'swap' and its promulgation regarding agricultural swaps (the predecessor notice to the proposed "Commodity Options" rule).

Chapter 8 comprises analyses of the proposed forms of the "Commodity Options" rule and the forward contract exclusion of the 'swaps' definition rule. Then, Chapter 9 analyzes the final rule for commodity options and the forward contract exclusion of the final rule defining 'swaps'. Finally, Chapter 10 turns to analyzing the revisions made to the interpretive guidance on forward contracts with embedded volumetric optionality, and to the revisions made to the "Commodity Options" rule through no-action letters[116] *and a newly crafted "Trade Options" rule.*

Through this analysis of OTC commodity derivative rulemaking, the primary objective of this thesis will be accomplished. An answer to how CFTC policymakers constructed OTC commodity derivatives regulations between 2010 and 2016 will be provided. To foreground a simplified version of this answer, Commission policymakers' construction of the rules governing OTC commodity derivatives was conditioned by an array

[116] As stated earlier, no-action letters represent a change in an administrative agency's (or of a division within an agency) stance towards enforcement of its ratified regulations and can be issued in response to the agency's post-final rule communications with stakeholders, among other reasons.

of interacting and co-evolving semiotic and extra-semiotic factors. This was evidenced in the evolving nature of the Dodd-Frank imaginary which guided these officials' regulatory endeavors. The forthcoming chapters thoroughly explore the factors which influenced agency policymakers' construction of the regulatory treatment of OTC commodity derivatives, thereby providing a robust account of Dodd-Frank era OTC commodity derivative rulemaking at the CFTC from 2010 through 2016.

Chapter 6 – A Historical Review of the Foundations to Dodd-Frank Era OTC Commodity Derivative Rulemaking at the CFTC

INTRODUCTORY MATTERS

Having built a vocabulary concerning financial derivatives and the markets in which they are transacted, and having sketched the U.S. administrative agency rulemaking process, this chapter turns to particulars about the specific administrative agency responsible for developing and applying the OTC commodity derivative rules that are explored and analyzed in Part III – the Commodity Futures Trading Commission (CFTC, or the Commission). Broadly, the chapter lays out the Commodity Futures Trading Commission's history with the regulation of OTC derivatives and, in particular, OTC commodity derivatives. This exploration begins at the agency's inception in the 1970s and ends with the 2010 Dodd-Frank Act's mandate from the U.S. Congress that it adopt rules to regulate OTC (commodity) derivatives. In tracing the CFTC's regulatory experience with OTC (commodity) derivatives, the chapter reviews pivotal moments of political contestation, bifurcations or departures from established regulatory norms, and the actions of policymakers at important regulatory and legislative junctures. Through this exploration, a central theme will emerge: that throughout the period leading up to the Dodd-Frank Act, CFTC policymakers continually wrestled with determining which OTC commodity derivatives could be regulated by the Commission.

In discussing the CFTC's historical experience with the regulation of OTC (commodity) derivatives, this chapter serves two purposes for this study's wider analysis. First, it identifies and explains the key OTC regulatory issues that confronted Commission policymakers throughout the pre-Dodd Frank Act era, particularly in regard to the contested conceptions of what could be regulated in the OTC commodity derivatives space – issues that would ultimately be addressed in the analyzed 2010-2016 rulemaking period.

And secondly, having established the foregoing, the analysis of recent rulemaking for OTC commodity derivatives can then be situated within a broader context, thus adding contextual richness from which this subsequent analysis may draw.

The chapter begins with a discussion of the early issues that the CFTC faced in carrying out its regulatory objectives. From that point, the chapter progresses to exploring contestation of the regulation of the broad spectrum of OTC derivatives during the contentious policymaking period of the 1990s. Later, the chapter presents the post-Commodity Futures Modernization Act era of non-regulation in which OTC commodity derivative trading flourished and experienced numerous crises; an era ending in financial crisis. The core aspects of the Dodd-Frank Act's regulatory regime for OTC derivatives, enacted in response to the financial crisis, and the pivotal arrival of Chairperson Gary Gensler at the CFTC are then reviewed. In concluding the chapter, the 'Dodd-Frank imaginary' – a concept that will be referred to throughout the later analysis – is introduced.

BACKGROUND: EARLY YEARS AT THE CFTC, THE ADVENT OF SWAPS TRADING, AND THE CFTC'S RESPONSE THERETO

Early Years at the CFTC

To explore the early years at the CFTC, and this agency's relationship with OTC commodity derivative regulation, it is important to bear in-mind that, as noted in Chapter 2, the Commission's regulatory mandate is to administer the Commodity Exchange Act. Likewise, it is vital to note that through the same legislative act that created the CFTC in the 1970s – the CFTC Act – the existing Commodity Exchange Act was amended in a couple of significant ways.

First, Congress, codifying language submitted to it by futures industry officials (MacKenzie 2018: 1656f), expanded the Commodity Exchange Act's definition of 'commodity' to include anything in which a "contract for future delivery"[117] was or might be traded, with one exception: onions (Stassen 1982: 833f). This meant that products such as gold, silver, petroleum, coffee, interest rates, and tradable mortgage certificates would be statutorily defined as 'commodities' and subjected to regulation under the Act. Second, the Commission was given exclusive jurisdiction to regulate all futures contracts and options contracts on commodities, as newly defined in the Commodity Exchange Act (Lower 1978: 1111).[118] The ostensible effect of this was to make the CFTC the regulator of commodity derivatives and the SEC regulator of all other tradable financial products.

Following from these amendments to the Commodity Exchange Act, the nascent CFTC was promptly faced with two significant problems relating to the regulation of OTC commodity derivatives. (Neither of these problems would, however, be comprehensively addressed until the Commission undertook rulemaking in connection with the Dodd-Frank Act of 2010 – the subject of this paper's rulemaking analysis.) The first problem pertained to the agency's regulatory approach to commodity options. Since the 1936 enactment of the Commodity Exchange Act, options trading on enumerated commodities[119] had been banned (Dunn Jr. 1982: 107). Nevertheless, in the years before the passage of the CFTC Act, options trading on non-enumerated commodities was undertaken on a substantial scale, due in large part to the profitability of such transactions resulting from the commodity price inflation of the early 1970s (Lower 1978: 1102f). Cases of fraud involving the trading of

[117] See Commodity Exchange Act § 4, 7 U.S.C. § 6 (1976).
[118] By being the regulator of 'commodities' contracted 'for future delivery', the CFTC's primary regulatory responsibility is to identify contracts that meet this definition and to require that these contracts be traded on a 'contract market' (i.e., an exchange market – not an OTC market). This is known as the 'exchange-trading requirement.'
[119] In 1976, enumerated commodities were defined as: "wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feed, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice." See Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 2 (1976).

these options were well-documented (Markham 2002: 43f; Stassen 1982: 839; Greenstone 1977: 183). Under the amended Commodity Exchange Act, however, the CFTC was granted authority to regulate options transactions on non-enumerated commodities,[120] and was tasked by Congress to study these transactions for possible regulation (Lower 1978: 1111f).

Notwithstanding the creation of the CFTC and its new regulatory authority, the proliferation of commodity options continued. These commodity options were traded over-the-counter and would often involve the option to buy or sell an underlying futures contract on a foreign exchange (i.e., London option) (Markham 1990: 16). While nearly a $1 billion industry by 1978, widespread fraud beset trading in these options (Markham 2002: 56). Due to this illegality and the agency handling of 200 investigations of commodity options trading firms between 1974 and 1978 (Markham 2002: 56), the CFTC banned, with two exceptions,[121] over-the-counter trading of options on June 1, 1978 (Markham 1990: 16; Lower 1978: 1097). In September of the same year, through the enactment of the Futures Trading Act of 1978, Congress, however, instructed the CFTC to develop a pilot program for exchange-traded options on futures (Markham 1990: 16; Dunn Jr. 1982: 107f).

Irrespective of this ban, commodity derivative trading firms developed new, futures- and option-like contracts – such as deferred delivery contracts[122] and leverage contracts – and undertook their trading (Markham 2002: 56ff; Markham 1990: 17f), thus posing the CFTC with a second problem: determining the specific character of a regulatable derivative instrument. For instance, as noted by Clark (1978: 1176-79), the distinction

[120] The trading ban on the enumerated commodities was, however, continued under the CFTC Act.
[121] First, for 'dealer options': options offered by large institutions whose commercial activities deal in the physical commodities for which the option is offered. Second, for 'trade options': options offered between commercial entities which relate to their commercial purposes. See Markham and Bergin (1984: 24).
[122] Over-the-counter option contract marketed as a forward contract to qualify for the CFTC's forward contract exclusion from regulation (Markham 2002: 56).

between a futures contract and a forward contract can be ambiguous, as in the case of leverage contracts, with differentiation hinging on physical delivery of the underlying commodity.[123] If a contract qualified as a futures, then it was subject to CFTC regulation, but if it was a forward, then it was exempt from CFTC regulation. Further, as indicated by Markham (2002: 56), options contracts on commodities were masked as forward or deferred delivery contracts to avoid the aforementioned trading ban. Moreover, as argued by Clark (1978: 1192-98), there existed a distinction without a difference between options and futures contracts on commodities, as both qualified as regulatable instruments under the Commodity Exchange Act's criterion of a "contract of sale of a commodity for future delivery," with delivery rarely taking place.

The Advent of Swaps Trading and the CFTC's Response Thereto

The early 1980s witnessed the commercial development of a new form of derivatives trading – swaps trading (Decovny 1998: 2). These new instruments likewise posed definitional issues relating to their regulatability for the CFTC. As explained in Chapter 1, in its basic form, a swap involves an exchange of future cash flows based on an asset referent. For instance, Party A may trade the percent increase (decrease) in price of Brent crude (oil), as settled on the last day of each month for a 6-month period, to Party B for a 3% interest rate paid on the last day of each month for the same period, both based on a $100 million principal. These derivative instruments, as well as other 'hybrid instruments', contained features of forward, futures, options, and, occasionally, securities (equity and bond) contracts (Markham 2002: 191), and were exclusively traded in OTC markets.

[123] The legitimacy of futures contracts as legally enforceable, non-gambling agreements had been contested around the turn of the 20th century. As explored in Levy (2006), these agreements secured their legality in the U.S. Supreme Court's 1905 *Chicago Board of Trade v. Christie Grain & Stock Co.* decision. In its judgment, the Court reasoned that because futures contracts 'contemplated delivery', they were not illegal and unenforceable gambling agreements.

Accurate data concerning the value of all swap transactions in the 1980s is sparse. Nevertheless, it was estimated that in 1982, the year after the anointed 'first swap' between IBM and the World Bank, the notional value[124] of transacted swaps was $3 billion.[125] Then, by 1986, the notional value of all OTC transactions reached approximately $500 billion.[126] Further, Decovny (1998: 11f) suggested a three-fold increase in the notional value of interest rate and currency swaps, and interest rate options, between 1987 and 1990, from around $1 trillion to $3.4 trillion. Notwithstanding the limited availability of accurate data, it can be stated unequivocally that trading in OTC derivatives – due especially to the advent of swaps – witnessed near geometric expansion during the 1980s. Although characterized as being "awakened only slowly" (Markham 2003: 365) to this growth, in 1987, the CFTC began the rulemaking process to address its OTC derivative market concerns.

Since its 1984 Joint Policy Statement with the SEC specifically identifying derivative contracts suited for transacting on regulated exchanges, the CFTC had reviewed inquiries about the regulatory status of OTC derivative instruments on a case-by-case basis (Partnoy 2001: 435).[127] In December 1987, however, after investigating the commodity swaps business of Chase Manhattan Bank for possible violations of the Commodity Exchange Act,

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[124] Again, this means the total face value of an asset position; not the amount of money paid for the asset position or owed to the counterparty. See the following: http://www.cftc.gov/MarketReports/SwapsReports/ExplanatoryNotes/index.htm.
[125] See William P. Rogers, Jr., 'Interest Rate and Currency Swaps and Related Transactions', in *The Swap Market in 1990*, at 7, 15 (Practising Law Institute Corp. Law and Practice Course Handbook Series No. 689, 1990).
[126] See Peter Lee, 'American Exchanges Plan to Fight Back', in *Euromoney*, January 1993, at 46.
[127] A "written statement by the staff of a Division of the Commission or its Office of General Counsel that such staff will not recommend that the Commission commence enforcement action for failure to comply with a specific provision of the [Commodity Exchange] Act or Commission regulations. It binds only the staff of the Division that issued it or the Office of the General Counsel with respect to the specific fact situation and persons addressed by the letter, and third parties may not rely upon it." See: http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm.

the CFTC issued an Advance Notice of Proposed Rulemaking[128] for OTC swaps and hybrid instrument trading (Young and Stein 1988: 1918). In short, the CFTC proposed to arrange OTC derivatives into three categories and to exclude these from its jurisdiction or exempt them from its regulation, with all derivative instruments not falling into one of the three categories continuing to be subject to the Commission's jurisdiction (Meer 1991: 411).

As a result, the CFTC proposed that swap transactions could, under certain circumstances, be subject to a no-action "safe harbor" from the agency's regulation (Young and Stein 1988: 1943). Implied by this proposal was that the CFTC viewed swaps as being within its regulatory jurisdiction and that swaps themselves were sufficiently futures-like to warrant exemptions (Young and Stein 1988: 1944f). To the former implication, the then-named International Swap Dealers Association (ISDA), the principal OTC trading industry consortium, was critical of the Commission's assumption of swaps into its regulatory purview (Meer 1991: 422). In its comment letter to the Advance Notice, ISDA stated that the regulatory expansion was "unwarranted" and that the Commission lacked a "compelling public policy" rationale and that "serious adverse effects" on U.S. and world swap markets "could result" if the CFTC regulated swaps trading.[129] To the latter implication, commenters noted that the Commission did not have the legal authority to exempt financial instruments resembling futures contracts from the exchange-trading requirement of the Commodity Exchange Act; thus swaps, according to the commenters, were already subject to the Act's exchange-trading requirement (Young and Stein 1988: 1945).

[128] The use of an Advance Notice, rather than the traditional Notice of Proposed Rulemaking, allowed for a preproposal comment period in addition to the typical comment period on a proposed rule.
[129] See Letter from Mark C. Brickell, Chairman of the International Swap Dealers Association, Inc. to the CFTC (April 8, 1988) at 3; in Meer (1991: 240).

In July 1989, in connection with the CFTC's Advance Proposal, and in response to comments thereon, the Commission promulgated a policy statement concerning its treatment of swaps (Rauterberg and Verstein 2013: 15; Markham 1990: 51). While not an enforceable administrative rule, the policy statement granted swaps settled in cash[130] with a "non-exclusive safe harbor" from the Commodity Exchange Act's exchange-trading requirement, provided that the swap transaction met five criteria (Partnoy 2001: 436; Meer 1991: 418f). Notwithstanding the issuance of this policy statement, no further clarity existed pertaining to the specific nature and regulatory classification of a swap contract, or to whether swaps were within the CFTC's jurisdiction and thus legally able to be exempted from regulation under the Commodity Exchange Act.

A prime example of the CFTC's nebulous position on its ability to regulate OTC commodity derivatives, irrespective of its 1987-1989 rulemaking efforts, came in 1990. After a U.S. Federal District Court in New York held that over-the-counter transactions involving 15-day Brent oil forward contracts could not qualify for the Commodity Exchange Act's forward contract exclusion, and would thus have to be traded on a contract market, the CFTC issued a statutory interpretation – known as the Brent Interpretation – stating that Brent contracts were not subject to the exchange-trading requirement (Markham and Harty 2008: 895; Meer 1991: 408). At the core of the federal District Court's decision was that the settlement of Brent oil forward contracts was done on a cash basis and not through physical delivery of the crude oil; thus, as the Court reasoned, the contracts were futures contracts (Albrecht 1995: 124; Meer 1991: 408). In its Brent Interpretation, the CFTC, however, contended that as forward contracts, the contracting parties maintained

[130] As opposed to those transactions that are physically settled by the delivery of the asset underlying the derivatives contract, cash settlement results in a party paying the counterparty the difference between the price of the derivative contract position when entered into and when closed out.

delivery obligations and other risks, which weighed greater than the practice of cash settlement when determining the nature of the derivative contract. Thus, in the Commission's estimation, these contracts would be excluded from regulation.[131] Regardless of this interpretation, the question of whether the CFTC had authority to exempt particular derivatives from the exchange-trading requirement of the Commodity Exchange Act remained unanswered (Markham 2002: 197). (It should be noted that the Brent Interpretation would be revisited in the context of the Commission's Dodd-Frank era OTC commodity derivative rulemaking and would serve as an important conceptual guide for policymakers during these efforts.)

CONTESTED DEFINITIONS OF OTC DERIVATIVES: FROM THE FUTURES TRADING PRACTICES ACT (1992) THROUGH THE COMMODITY FUTURES MODERNIZATION ACT (2000)

The 1990s presented the CFTC with the same fundamental regulatory question as it had confronted since its inception: what qualified as a regulatable commodity for future delivery and, thus, a regulatable OTC (commodity) derivative? As was expressed in the preceding section, this issue directly posed regulatory identification and enforcement problems for the Commission. Moreover, the CFTC faced these issues at a time when OTC markets in the U.S. were experiencing rapid growth. Given continued ambiguity of the CFTC's regulatory position in relation to OTC markets after its Brent Interpretation, at the Commission's next reauthorization date, Congress intervened to provide some clarity. The culmination of Congress's efforts was the passage of the Futures Trading Practices Act of 1992.

[131] Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188 and 39191-2 (1990).

The Futures Trading Practices Act of 1992 and OTC Exemptions

Signed by Republican President George H.W. Bush in 1992, the Futures Trading Practices Act contained five titles (or major parts), of which Title V specifically addressed the extent of the CFTC's exemptive authority over OTC derivatives.[132] Under Title V, the Commission was granted authority to exempt from the exchange-trading requirement of the Commodity Exchange Act any agreement, contract, or transaction provided the following: (1) that the exemption is in the "public interest"; (2) that the exemption does not have a "materially adverse effect" on the Commission's and regulated exchanges' ability to perform their regulatory responsibilities; (3) that the exemption involves trades between sophisticated, knowledgeable, or institutional investors (i.e., "appropriate persons" in the language of the 1992 Act); and (4) that no exemption violates the jurisdictional delineation of the Shad-Johnson Accords (Lindholm 1994: 90f; Leon 1994: 335; Russo and Vinciguerra 1992: 100f). This meant that for the first time, the CFTC had explicit authority to exempt from the exchange-trading requirement of the Commodity Exchange Act those derivative contracts that might be considered regulatable futures or options. Further, Title V similarly allowed the Commission the authority to exempt swaps, Brent oil contracts, and other similar OTC commodity derivative instruments. Nevertheless, it is important to note – and this cannot be emphasized enough – that the Futures Trading Practices Act of 1992 did not require the CFTC to use its exemptive power; rather, its use was at the Commission's discretion (Russo and Vinciguerra 1992: 100).

In mid-January 1993, the CFTC utilized its new authority to exempt from potential regulation a substantial portion of the swap market; this action representing an attempt to clarify which OTC derivatives the Commission viewed as regulatable. In presumed

[132] Pub. Law No. 102-546, 106 Stat. 3590 (1992).

accordance with the guidelines set forth in Title V of the Futures Trading Practices Act, the CFTC proposed on November 12, 1992, and finalized on January 22, 1993, the exemption, known as 'Part 35'. While much speculation exists as to the political motives behind the expedited promulgation of Part 35, it is important to note that the Commission's Chair, Wendy Gramm, left the CFTC immediately after the adoption of the rule, and within a matter of weeks joined the board of directors of Enron, an energy and derivatives trading company (Carruthers 2013: 395).[133] The Part 35 exemption precluded swaps[134] from being subject to the Commodity Exchange Act's exchange-trading requirement if they met the following general criteria: (1) the swap is entered into between "eligible swap participants"[135]; (2) the creditworthiness of swap parties be a "material consideration" when drafting the swap contract; (3) the swap parties have no less than $5 million or $10 million in total assets, depending on the trader's line of business; (4) the swap not be part of a "fungible class of agreements that are standardized as to their material economic terms"; and (5) the swap not be transacted on a "multilateral execution facility."[136]

Part 35 was adopted as a retroactive rule, meaning that all qualifying swap transactions entered after the enactment of the Commodity Futures Trading Commission Act of 1974 (October 23, 1974) were exempted from the exchange-trading requirement.[137] Notwithstanding the exemption, exempted swaps were still subject to the Commodity

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[133] Of note, Democrat President Bill Clinton was inaugurated on January 20, 1993.
[134] The definition of a swap used in Part 35 was that listed in the U.S. Bankruptcy Code (11 U.S.C. § 101(55) (Supp. IV 1992)) with the addition of a swap "master agreement" (Rechtschaffen 2014: 332).
[135] Defined to include: "(i) bank or trust companies (acting on their own behalf or on behalf of another eligible swap participant), (ii) savings associations or credit unions, (iii) insurance companies, (iv) investment companies, (v) commodity pools, (vi) corporations, partnerships, proprietorships, organizations, and trusts, (vii) employee benefit plans subject to ERISA, (viii) any governmental entities or political subdivision thereof, (ix) broker-dealers subject to regulation under the Securities Exchange Act of 1934, (x) futures commission merchants, and natural persons" (Lindholm 1994: 92).
[136] Exemption for Certain Swap Agreements, 58 Fed. Reg. 5594 (1993).
[137] Ibid., at 5587.

Exchange Act's anti-fraud and anti-manipulation regulations (GAO 1999: 10). The 1993 Part 35 exemption went beyond the 1989 CFTC policy statement in that it provided swap market participants with an enforceable rule to prevent the exchange-trading of their transactions.

Pursuant to the exemptive criteria of the Futures Trading Practices Act, on January 27, 1993 the CFTC proposed, and on April 20, 1993 it codified, a similar rule for OTC energy contracts, known as the 'Energy Exemption'.[138] In addition to formally exempting Brent oil contracts from the exchange-trading requirement,[139] the rule extended to all OTC contracts involving crude oil, natural gas, and products derived therefrom or attained in the production thereof, irrespective of any degree of futures-like characteristics.[140] Thus, the CFTC treated all energy contracts that were not already traded on a futures exchange as unregulatable forward contracts (or in some instances, as swaps). This rule, however, went further than the Part 35 exemption in that it waived the Commission's application of Commodity Exchange Act anti-fraud (and thus anti-manipulation) regulations to the exempted energy contracts. Nevertheless, a degree of irony was imbedded in the Commission's decision because if, as it had claimed since its Brent interpretation in 1990, OTC energy contracts were forwards, then they were already outside of the CFTC's regulatory jurisdiction, and not subject to the anti-fraud and anti-manipulation provisions of the Commodity Exchange Act. Accepting that there was, thus, neither authority to exempt these contracts, nor need to do so, as they were not even subject to regulation under the Act.

[138] Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21286 (1993). The April 13, 1993 vote on this rule was a 2-1 decision in favor of adoption. Two of the commissioner seats were vacant at the time of the vote.
[139] Recall that a Federal District Court ruled that Brent oil contracts were futures, but the CFTC issued an interpretation of the ruling which reasoned that the contracts were forwards and thus excluded from Commodity Exchange Act regulation.
[140] Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21286 (1993).

Legal Uncertainty and the Enactment of the Commodity Futures Modernization Act of 2000

Between 1993 and 1998, no significant new OTC derivative regulations, or revisions to existing regulations, were crafted by the CFTC or directed by Congress. Regardless of this regulatory lull, OTC derivative markets continued to expand rapidly, with global notional value of all OTC derivatives reaching between $80-$90 trillion in 1998, and the notional value of OTC commodity derivatives exceeding $400 billion in the same year (BIS 2017).[141]

By the late-1990s, however, the stable regulatory landscape for OTC derivatives began to experience some tremors. Under Chairperson Brooksley Born, the CFTC promulgated in May 1998 a Concept Release concerning OTC derivative regulation.[142] The Concept Release did not propose any new rules, but rather categorized areas of potential exemptive changes – such as modifying the non-standardization requirement for swaps, updating the definition of "eligible swap participants," and altering the ban on the use of "multilateral execution facilities" and central clearing for which the Commission sought public comment.[143] Further, the Release explicitly stated the following: (1) any new OTC market regulations would only be "applied prospectively"; (2) all current OTC derivative exemptions, interpretations, and policy statements remained in effect and could be relied upon by "market participants"; and (3) the Commission had "no preconceived result in mind" concerning maintaining the current regulatory framework, loosening the existing framework, or applying a more stringent regulatory architecture.[144] Irrespective of its position of intellectual openness, the CFTC was promptly admonished by leaders of then-

[141] In the first half of 1997, it was estimated that the market value of all globally outstanding OTC derivative contracts was $860 billion (GAO 1997). By comparison, world GDP in 1997 was estimated at $31.44 trillion (World Bank 2018).
[142] Over-the-Counter Derivatives, 63 Fed. Reg. 26114 (1998).
[143] Ibid., at 26115f.
[144] Ibid., at 26116.

President Clinton's so-called President's Working Group[145] for what they perceived as potential threats to OTC derivative market growth and macroeconomic stability.[146]

Within several weeks of the Concept Release's publication, the President's Working Group (excluding Chair Born) successfully petitioned Congress to curtail the CFTC's rulemaking authority over OTC derivative markets until March 30, 1999, and to ensure the enforceability of OTC derivatives under the 1993 Part 35 exemption and the 1989 policy statement (Working Group 1999b: 13). During corresponding U.S. Senate hearings on this curtailment of the Commission's authority to potentially intervene in OTC derivative markets, Chairperson Born defended the agency's decision to issue the Concept Release, and in doing so, provided important perspective on how CFTC policymakers viewed the matter of regulatability of OTC swaps and other similar derivative instruments. Specifically, in remarks before the Senate committee which addressed the historically recurring claim questioning the jurisdictional authority of the CFTC over OTC derivative instruments, Chair Born resolutely noted that "it is the nature of the instrument, and not where they are traded, that determines jurisdiction" under the Commodity Exchange Act; thus, implying that swaps were indeed regulatable derivative (i.e., futures) contracts.[147]

In the aftermath of the late-1998 failure of the "hedge" fund Long-Term Capital Management (LTCM), the President's Working Group was again brought together and was tasked by Congress with examining the incident and providing recommendations to avert

[145] A group advising the U.S. President on economic and financial matters which comprised the Treasury Secretary, the Federal Reserve Chairperson, the Securities and Exchange Commission Chairperson, and the Commodity Futures Trading Commission Chairperson.
[146] Notably, immediately after the promulgation of the Concept Release, Assistant Treasury Secretary Larry Summers phoned Chair Born telling her that he had "13 bankers" in his office who told him that what the CFTC proposed would "cause the worst financial crisis since the end of World War Two" (Johnson and Kwak 2010).
[147] See The Commodity Exchange Act and OTC Derivatives, Before the Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, 105th Congress (July 30, 1998). Available at: http://www.cftc.gov/opa/speeches/opaborn-34.htm.

further systemic financial calamities (Greenberger 2011: 139). As LTCM was a significant OTC market participant, the Working Group's April 1999 report seemingly reversed its earlier course and recommended, among other things, that federal agencies, including the CFTC, receive data and information related to credit risk and concentrations of OTC derivative positions, and the exploration of direct federal regulation of unregulated OTC derivative dealers (Working Group 1999a: 39f, 42f). Nevertheless, subsequent to Chairperson Born's June 1999 resignation, the Working Group reversed course yet again in the November 1999 release of its year-long study entitled "Over-the-Counter Derivative Markets and the Commodity Exchange Act." With the unanimous consent of the Working Group, the report recommended the following affecting OTC commodity derivatives: (1) Exclusion from the Commodity Exchange Act of "bilateral transactions between sophisticated counterparties (other than transactions that involve non-financial commodities with finite supplies)"; (2) exclusion from the Commodity Exchange Act of "electronic trading systems for derivatives, provided that the systems limit participation to sophisticated counterparties trading for their own accounts and are not used to trade contracts that involve non-financial commodities with finite supplies"; (3) amending laws to allow for the clearing of OTC derivatives; and (4) extending the exclusive jurisdiction over 'commodities for future delivery' conferred by the Commodity Exchange Act onto the CFTC *to only* those futures contracts, and options on futures contracts, transacted on a contract market (regulated exchange) and not otherwise subject to another agency's authority (Working Group 1999b: 2, 30f).

The Commodity Futures Modernization Act of 2000 codified many of the recommendations made in the November 1999 report and those from a similar February 2000 CFTC-authored report affirming the Working Group's conclusions (Wolkoff and Werner 2010: 357ff). This Act's legislative history is famously subject to political intrigue due to its being championed by Republican Senator Phil Gramm of Texas (husband of former CFTC Chairperson Wendy Gramm), the undebated revisions incorporated into it at the eleventh hour, and because it was attached and voted on as a codicil to an 11,000-page appropriations bill during a lame-duck session[148] of Congress on December 15, 2000 (Greenberger 2010: A8). In short, the Act statutorily excluded swaps and other similar OTC derivatives from the exchange-trading requirement of the Commodity Exchange Act – thus, predominantly ensuring the non-regulation of OTC derivatives – and allowed for central clearing of OTC products (Hazen 2005: 388-395). Furthermore, under the Commodity Futures Modernization Act, a tiered-approach to regulation for differing asset markets – as based on sophistication and perceived risk to traders and the derivative marketplace – was created with corresponding regulatory principles developed for each of these tiers (Keaveny 2005: 1437; Rosenzweig 2001: 43). As it specifically relates to OTC commodity derivatives, the Act categorized them as 'Exempt Commodities' – a classification comprising energy and metal derivatives (Rosenzweig 2001: 44).[149] (Going forward in this study, when the term 'OTC commodity derivative(s)' is utilized, it will be synonymous with the definition of 'Exempt Commodities.')

Although at odds with the spirit of the November 1999 report's recommendation on the non-exclusion of finite commodities, several principles were established to exempt OTC commodity derivatives trading from regulation under the Commodity Exchange Act – each of which being an important legislative development in defining which, if any, OTC commodity derivatives the CFTC could regulate. First, trading could only involve "eligible

[148] A session of Congress after the election of a new President, but before the President-elect's inauguration.
[149] Two other derivative classifications were developed: 'Excluded Commodities' (comprising interest rate, exchange rate, and credit derivatives, among other financial-based instruments) and 'Agricultural Commodities' (Rosenzweig 2001: 44).

contract participants" (Kloner 2001: 288).[150] Second, bilateral trades involving OTC commodity derivatives between eligible contract participants which were not transacted on an electronic trading facility were exempt from all regulatory oversight, except for limited application by the CFTC of anti-fraud and anti-manipulation regulations (Kloner 2001: 290f). Third, OTC commodity derivative trading between "eligible commercial entities"[151] could be conducted on an "Exempt Commercial Market" – a new legally defined entity which operated as a look-alike electronic futures exchange – provided the trading was undertaken on a "principal-to-principal basis," and that the Exempt Commercial Market was subject to limited CFTC oversight (Lukken 2010: 300).

COMMODITIES AND CRISES: FROM ENRON-ONLINE THROUGH THE DODD-FRANK ACT OF 2010

In prefacing this section, it should be noted that from the adoption of the Commodity Futures Modernization Act of 2000 until the enactment of the post-financial crisis Dodd-Frank Act in 2010, there were no significant changes to the treatment of OTC derivatives by regulators such as the CFTC (Spence 2009: 50). The Commodity Futures Modernization Act had provided legislative clarity concerning what could not be regulated by the Commission – in this case, essentially all OTC commodity derivatives, among other OTC products. Nevertheless, the historical fluidity regarding what constituted a CFTC-regulatable derivative contract – which has been covered in the preceding sections – must be kept in-mind. This is because the developments of this culminating decade-long period highlight the individual and systemic consequences associated with having left unregulated futures-

[150] Those qualifying for this definition included financial institutions, government entities, futures commission merchants, and, among other enumerated entities, any individual with total assets greater than $10 million (Lukken 2010: 297).
[151] Defined as an eligible contract participant that is also a "large dealer or a commercial participant in the commodity business" (Lukken 2010: 300).

like contracts traded in OTC markets; the effects of which would later be addressed by the Dodd-Frank Act and corresponding administrative agency rulemaking. The legislative approval in 2000 of the development of Exempt Commercial Markets for OTC commodity derivatives – such as EnronOnline – provides an excellent starting point for understanding this notion.

Exempt Commercial Markets, Price Manipulation, and a Decade of Crises

While the Commodity Futures Modernization Act legally established Exempt Commercial Markets through its Section 2(h)(3-5), in practice, one such electronic trading platform for OTC commodity derivatives was already in existence by November 1999 – EnronOnline. Operated by Enron Corporation, EnronOnline was an electronic global OTC commodity derivative trading platform that made its parent company party to the derivative purchase and sale agreements transacted thereon (Electric Light & Power 1999).[152] This made Enron a *de facto* derivative dealer in OTC commodities, even though the platform mirrored the operations of a regulated futures exchange. The platform was an immediate success, transacting $336 billion in OTC derivatives in 2000 (Salter 2008: 26).[153] Nevertheless, under commercial pressures, and stemming from ethical lapses precipitating accounting fraud, Enron Corporation filed for bankruptcy in December 2001 (McLean and Elkind 2003).

Notwithstanding its relatively short existence, EnronOnline had three significant impacts on OTC commodity derivative markets from 2000 onward. First, Enron intimately influenced the statutory development of Exempt Commercial Markets. As EnronOnline existed prior to the Commodity Futures Modernization Act, its design and the OTC

[152] See also: Hale, Briony. "Enron's internet monster". *BBC News Online*, 30 November 2001. Available at: http://news.bbc.co.uk/1/hi/business/1684503.stm.

[153] Ibid. Per Briony Hale, in total, EnronOnline made Enron Corporation counterparty to roughly $880 billion of OTC derivatives between 1999 and 2001.

derivative transactions it facilitated were arguably outside of the 1993 and 1989 CFTC exemptions for OTC derivatives; thus, making it an illegal contract market transacting derivatives that should be exchange-traded. Because of this risk, Enron, as indicated in emails made public after its bankruptcy, assiduously lobbied Congress – particularly Senator Phil Gramm – throughout the legislative process for the Commodity Futures Modernization Act.[154] While the emails indicate Enron's desire to have its EnronOnline platform exempted from core Commodity Exchange Act regulations through the Exempt Commercial Market provision, it also supported exempting bilateral OTC commodity derivative transactions and excluding credit derivative instruments from these regulations (Lipton 2008). For its lobbying efforts, the term "Enron Loophole" entered the political lexicon and became the source of occasional legislative attempts to regulate OTC commodity derivatives over the decade.

The second significant impact stems from the effects of codifying the Exempt Commercial Market provision. Beyond creating a new, exempt regulatory category of OTC commodity derivative trading which ensured the legal viability of EnronOnline, the inclusion of the provision permitted the development of other Exempt Commercial Markets. Most notable among these was Intercontinental Exchange (ICE). Fitting within the parameters of Section 2(h)(3-5), Exempt Commercial Markets (such as EnronOnline, DynegyDirect, and ICE) allowed commodity derivative trading participants access to predominantly unregulated future-style exchanges on which to transact derivative instruments. These were venues where regulations of traditional exchanges, such as position limits, were not applicable. With the proliferation of these largely unregulated trading venues, and their concomitant linkage to and influence on commodity spot markets and regulated

[154] See: Lipton, Eric. "Gramm and the 'Enron Loophole'". *The New York Times*, 14 November 2008. Available at: https://www.nytimes.com/2008/11/17/business/17grammside.html.

commodity exchanges, the incidence of illegal and unethical trading practices likewise proliferated.

Along these lines, the third impact of EnronOnline was its involvement in the earliest noted attempts to manipulate energy prices through the use of an Exempt Commercial Market. The manipulation schemes involved electricity and natural gas prices in the Western U.S., especially in California (Markham and Harty 2008: 917; Brunet and Shafe 2007: 665). Although Enron was not the last derivative trading firm to manipulate energy prices between 2000 and the financial crisis of 2007-08, as the early-2000's leading energy trading firm transacting derivatives through an Exempt Commercial Market, Enron's precedent-setting speculative and illegal activity spurred calls for revisiting the non-regulation of OTC commodity derivatives. Further, stemming from such behaviors, numerous financially punitive actions were brought against energy companies and energy trading firms by the CFTC during this time.[155] These were undertaken in accordance with the limited anti-manipulation and anti-fraud regulations that remained available to the Commission by way of the Commodity Exchange Act.

A final item to note regarding Enron was that even after its failure, OTC commodity derivative traders still sought to partake in markets for these instruments on platforms similar to EnronOnline. As such, many marketplace participants migrated to two venues: New York Mercantile Exchange (NYMEX) – a regulated exchange market – and Intercontinental Exchange – an Exempt Commercial Market (Penick 2010: 240). While NYMEX offered traders the relative safety of a CFTC-regulated futures and options market, and ICE offered traders many of the same benefits as EnronOnline, importantly, in responding to concerns about credit risk, by 2002, both exchanges introduced central

[155] For access to a complete database of these enforcement actions, visit: http://www.cftc.gov/LawRegulation/Enforcement/EnforcementArchive/index.htm.

clearing mechanisms for OTC commodity derivatives – NYMEX through its CFTC-approved ClearPort platform, and ICE through its ICE Clear facility (Overdahl 2010: 291; Brown-Hruska 2010: 26f).

With commodity trading crises in the political foreground, a few pieces of legislation aimed at addressing their perceived causes found their way before the U.S. Congress. For instance, initially introduced to the Senate in February 2002, but reconstituted as an amendment to the Energy Policy Act of 2003, Democrat Senator Diane Feinstein proposed a bill that sought, among other things, to impose large trader reporting on Exempt Commercial Markets – thus, moving them in the direction of being regulated exchanges – and to completely apply the anti-fraud and anti-manipulation provisions of the Commodity Exchange Act to OTC derivatives trading – except for transactions in Excluded (financial) Commodities and metals (Brunet and Shafe 2007: 687). A further proposal, the Energy Policy Act of 2005, provided the Federal Energy Regulatory Commission (FERC) with expanded authority to enforce prohibitions on manipulation of physical natural gas and electricity prices (Greenberger 2013: 743f). Nevertheless, this Act did not modify any of the statutory exemptive provisions on which OTC commodity derivative trading relied, and it facilitated a jurisdictional dispute between the CFTC and FERC involving cases where manipulation occurred from the use of natural gas futures contracts (Markham and Harty 2008: 920).[156]

The continuing lack of unqualified regulatory oversight regarding Exempt Commercial Markets – and the OTC commodity markets in general – was again brought to the fore after the August 2006 failure of the hedge fund Amaranth. This collapse was

[156] The question being as follows: If a party traded natural gas futures as a stratagem to manipulate the price of physical natural gas, or the converse, would the CFTC or FERC have jurisdiction to bring anti-manipulation action?

precipitated by the firm losing $6 billion in one week while speculating on natural gas prices (Markham 2014: 297). After assuming exceptionally large natural gas positions on the CFTC-regulated NYMEX exchange, which prompted the CFTC to call for a reduction of the size of its derivative positions, Amaranth moved its entire natural gas derivative portfolio into natural gas swaps on the largely unregulated ICE platform – an Exempt Commercial Market (Markham 2014: 297). A subsequent Senate investigation found that Amaranth's trading activity prior to its failure, and the event of its failure, significantly affected physical natural gas prices in the U.S. (Jickling 2008a: CRS 5). Although lengthy court battles ensued due to the jurisdictional uncertainty between the CFTC and FERC, both administrative agencies attained multimillion-dollar settlements against Amaranth (Greenberger 2013: 744; Markham 2014).

As mentioned above, the Commodity Futures Modernization Act extended participation in Exempt Commercial Markets to large commodity dealers and commercial participants whose line of business was commodities. Amaranth, however, was not a company principally involved with physical commodities; it was a hedge fund. Its entry into OTC commodity derivatives trading was emblematic of a wider trend of financial institutions becoming increasingly active in OTC commodity derivative markets – partaking in both the Exempt Commercial Market and bilateral trading (Pirrong 2010: 132). The entry of these participants served to deepen the linkages between OTC commodity derivatives, physical and other financial markets, and the real economy; this being especially true for crude oil which, influenced by substantial speculative inflows of capital into crude oil derivatives, attained its all-time peak absolute price (both for Brent and West Texas Intermediate petroleum) in the summer of 2008 (Gkanoutas-Leventis and Nesvetailova 2015). Aware of this trend of increasing physical commodity prices, and of the decade's commodities trading crises, in the months preceding the September 2008 failure of Lehman

Brothers, the CFTC and Congress began reassessing the regulatory infrastructure for OTC commodity derivatives.

On numerous occasions in 2007, including in testimony before Congress, Acting CFTC Chairperson Walter Lukken stated recurrently that commodity derivative instruments traded on Exempt Commercial Markets – such as ICE – and on regulated futures and options exchanges – such as NYMEX – had become so similar in nature as to be "virtual substitutes."[157] Moreover, Chair Lukken concurred with the argument advanced by NYMEX that even the two platforms could be viewed as substitutable and that many of the instruments traded on the platforms were tightly correlated with each other, thereby linking and affecting the instruments' prices across platforms.[158] Nevertheless, at his July 2007 Senate testimony, Chairperson Lukken maintained that additional regulation of Exempt Commercial Markets – beyond the limited regulations of five-year record retention, weekly reporting of basic trade information (excluding the trader's identity), and CFTC 'special call' authority[159] – was unnecessary. Notwithstanding this statement, later at the same hearing, the chief executive officer of ICE, Jeffrey Sprecher, testified that additional regulations were needed and that, personally, he was amenable, in principle, to further regulation of ICE.[160] Eventually, CFTC leadership came to agree with Intercontinental

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[157] For example, see, among others: Hearing to Examine Trading on Regulated Exchanges and Exempt Commercial Markets, September 18, 2007; Walk Softly and Carry a Big Stick, ISDA Energy, Commodities and Developing Products Conference, November 29, 2007; Opening Statement Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, 110th Congress (December 12, 2007). All statements available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/lukken/index.htm.

[158] See Haldis, Peter. "NYMEX to Congress: Regulation of ICE Should Be Increased". *World Refining & Fuels Today*, 13 July 2007, Vol. 2, Issue 134, at 8.

[159] A requirement that the receiver of the call (or letter) provide requested data and information to the CFTC.

[160] See Speculation in the Natural Gas Market, Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, U.S. Senate, 110th Congress (July 9, 2007). As per an interview with a former CFTC policymaker, the response to this statement was one of incredulity on the part of Senator Carl Levin: "…wait a minute, you got

Exchange's CEO, after an internal agency study suggested that further regulation of Exempt Commercial Markets was warranted (The Monitor 2008).

The results of this study were presented to Congress by the CFTC in October 2007 in the form of new regulatory recommendations. Among other recommendations, these importantly included that, for certain derivative contracts determined to provide a "significant price discovery function" in the commodity derivatives space, large traders of such agreements be subject to CFTC reporting obligations and that Exempt Commercial Markets impose position limits on these same instruments.[161] Broadly, these requirements were in-keeping with comparable regulations governing regulated exchange markets (Snow 2007: 26). In the same month that the CFTC presented its recommendations to Congress, the U.S. Government Accountability Office (successor to the General Accounting Office) released findings from a self-initiated study of OTC commodity derivatives. The findings encouraged Congress to explore altering the scope of the Commission's authority over OTC commodity derivatives trading (GAO 2007). In May 2008, as part of the CFTC's reauthorization under the Food, Conservation, and Energy Act of 2008, Congress passed into law the recommendations that the Commission had made the previous autumn as an amendment to the Commodity Exchange Act.[162]

Irrespective of this amendment, it is important to reiterate that the regulatory provisions extended only to qualifying contracts on an Exempt Commercial Market, and not to the entire commercial marketplace for OTC commodity derivatives. Therefore, bilateral

somebody that actually wants to be regulated and you're saying that you don't want to regulate them?" (Interview, 9 October 2017, Washington, D.C.).

[161] See Prepared Remarks, Acting CFTC Chairman Walt Lukken, Compliance and Enforcement in Energy Markets – The CFTC Perspective, FERC Compliance Summit, January 18, 2008. Available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/speechandtestimony/opalukken-34.pdf.

[162] Pub. Law No. 110-234, 122 Stat. 923 (2008).

OTC commodity derivative contracts – which would later become a major focus of Dodd-Frank Act, post-financial crisis rulemaking – were not affected by this legislation. As indicated by Jickling (2008b: CRS-6), swaps and other bilaterally negotiated commodity derivative instruments comprised a "large and growing" market wherein the same parties transacting on Exempt Commercial Markets were "very likely" simultaneously transacting in other derivatives on an over-the-counter, bilateral basis. Nevertheless, owing to the Commodity Futures Modernization Act, a substantial portion of all OTC (commodity) derivative activity remained beyond the view of the CFTC.[163] It would not be until the adoption of the Dodd-Frank Act in July 2010 that the veil mediating the gaze of regulators would undergo the process of being lifted.

Coupled with an over-leveraged financial system engaged in systemic Ponzi financing, those OTC derivatives – in the category of Excluded Commodities – transacted in opacity from regulators helped push the U.S. economy into its worst crisis since the Great Depression of the 1920s and 1930s. Credit defaults – like the one experienced by Lehman Brothers in September 2008 – sent the fair value of derivative positions held by U.S. bank holding companies on an upward linear trajectory in 2008 (Abdel-khalik and Chen 2015: 294). Under obligation to net out their OTC derivative positions and pay the balance on the positions to the contracts' counterparties, banks and other financial institutions experienced extreme financial duress in meeting these commitments. As a result, beginning in 2008, the U.S. government and the Federal Reserve intervened, providing monetary injections (bailouts) and other forms of assistance to myriad banking, investment, and

[163] In the Commission's October 2007 report, the agency concluded that bilateral over-the-counter trading – specifically in commodities, but one can assume that the statement may be read broadly to include all forms of OTC derivatives – had only limited impact on "other parties and markets" and that this trading's "non-standardized form" and the "significant size and dispersion of [OTC] markets would make it extremely costly and difficult to extrapolate beneficial market surveillance information on a routine basis" (CFTC 2007: 20).

commercial enterprises (Schwarcz 2009). In this moment of crisis, political support for challenging the non-regulation of OTC derivatives had finally arrived.

The Arrival of Chairperson Gensler and the Dodd-Frank Regime for OTC Derivatives

The experience of a severe global financial crisis, coupled with the arrival of newly elected Democrat President Barack Obama in 2008 (in addition to a Democrat-controlled House of Representatives and Senate), brought OTC derivative market reform to the vanguard of financial policymaking agendas in the U.S. As such, two key developments for the CFTC took place between 2009 and 2010: the arrival of a new chairperson – the pro-financial reformer Gary Gensler – and the enactment of financial reform legislation – the Dodd-Frank Act; both of which were politically supported by the reform-minded Democrat-controlled Congress and Presidency. Although Chair Gensler's influence on the Commission's OTC commodity derivative rulemaking will be examined more closely in chapters 8 and 9, his tenure at the CFTC – which spanned from May 2009 until January 2014[164] – was characterized as reformist in nature,[165] with some observers even going so far as to refer to Gensler as the Obama administration's toughest regulator.[166] This notwithstanding his pre-civil servant career as a Wall Street banker.[167] Under Gensler's leadership, the Commission would undertake multitudinous rule-makings to regulate OTC derivatives pursuant to the Dodd-Frank Act.

[164] See: https://www.cftc.gov/About/Commissioners/FormerCommissioners/ggensler.html.
[165] See: Bowley, Graham. "Goldman Deal-Maker Now Advocates Regulation". *The New York Times*, 10 March 2010. Available at: https://www.nytimes.com/2010/03/11/business/11cftc.html.
[166] Yglesias, Matthew. "Timothy Massad Tapped as Chief Derivative Regulator". *Slate*. 12 November 2013. Available at: https://slate.com/business/2013/11/timothy-massad-cftc-new-chair-will-be-a-team-player.html.
[167] Ibid.

Signed into law in July 2010 by President Obama, the Dodd-Frank Wall Street Reform and Consumer Protection Act emerged from multiple earlier proposals[168] and provided, among other things, a framework for the regulation of OTC derivatives.[169] Through Title VII of the Act, styled Wall Street Transparency and Accountability, Congress amended the Commodity Exchange Act to grant the CFTC regulatory authority over swaps, thus rescinding the 'excluded' and 'exempted' designations given to OTC derivatives under the Commodity Futures Modernization Act and, in the process, bringing these derivative instruments under the umbrella of regulatability. While the Dodd-Frank Act specifically used the term 'swap' in referring to those 'swaps' which are "commonly known" – e.g., credit default swaps, interest rate swaps, etc. – it instructed the CFTC to codify a rule precisely defining the term (Awrey 2012: 284).

Through its 'swap' definition rulemaking, and given its newly acquired regulatory authority, the Commission would finally arrive at a decision concerning which OTC derivatives would be regulated. To venture beyond this chapter, note that the final rule adopted by the CFTC defined the term 'swap' broadly, in that it extended beyond the textbook definition of two parties exchanging cash flows at a future date to derivatives such as options and those instruments containing variants of optionality. The agency's determination of which OTC commodity derivatives would be regulated under the Dodd-Frank Act (i.e., the construction of OTC commodity derivative regulations) serves as the principal point of analytical inquiry moving forward throughout this Part of the thesis.

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[168] These included, among others, a U.S. House of Representatives bill – the Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Congress – a U.S. Senate bill – the Restoring American Financial Stability Act of 2010, S. 3217, 111th Congress – and a U.S. Treasury Department proposal – the *Financial Regulatory Reform: A New Foundation* report. See Baker (2010: 1333-1336) for a discussion of key proposals, with emphasis on the Department of Treasury's report.
[169] Pub. Law No. 111-203, 124 Stat. 1376 (2010).

The Dodd-Frank Act also established the designations of ‘swap dealers’ and ‘major swap participants’ – with the CFTC and SEC again instructed to finalize the definitions of these terms. Generally, the relevant dealers and participants include those institutions who routinely make markets or transact swaps exceeding a *de minimis* monetary threshold (Rechtschaffen 2014: 220f). Both ‘swap dealers’ and ‘major swap participants’ are required to register with the CFTC and to uphold specified business conduct standards and minimum capital and margin requirements for their derivative trading (Rechtschaffen 2014: 220f, 224). Further, the Act amended the Commodity Exchange Act by requiring that only those parties qualifying as ‘eligible contract participant(s)’ be legally permitted to transact swaps; excluding those transactions conducted on a registered (regulated) board of trade (exchange market).[170] Again, the definition of ‘eligible contract participant’ – a term originating from the Commodity Futures Modernization Act’s efforts to exclude certain financially “sophisticated” entities from Commodity Exchange Act regulations (McBride 2010: 1088) – was left to the CFTC (and the SEC) to define (Awrey 2012: 284).

Beyond requiring elaboration on important definitions, the Dodd-Frank Act mandated the development of a post-trading infrastructure for OTC derivative transactions. As with the above definitional issues, the full creation of this infrastructure was delegated to the CFTC for codification through its rulemaking power. The first facet of the infrastructure was the requirement that all OTC transactions qualifying as ‘swaps’ be reported into a Swap Data Repository. This reporting requirement served to amalgamate all data and information relevant to the swap transaction in a centralized, CFTC-accessible database. Furthermore, those ‘eligible contract participants’ transacting swaps were required to maintain records of the swap transaction.

[170] See Commodity Exchange Act § 2, 7 U.S.C. § 2(e) (2012).

The second aspect of the post-trading infrastructure was the requirement that qualifying ‘swaps’, capable of and required to be cleared, be subject to central clearing through a CFTC-registered and approved clearinghouse. Broadly, this provision of the Dodd-Frank Act sought to minimize credit risk associated with OTC derivative trades – a serious problem that financial institutions had confronted during the financial crisis. (Yadav 2013: 390ff). The final facet of the post-trading infrastructure was the imposition of margin requirements on cleared and uncleared qualifying ‘swaps,’ with the clearing organization setting them, if the swap was cleared, and the CFTC setting the amount, if the swap was left uncleared (Rechtschaffen 2014: 224f). Although sometimes considered a part of a post-trading infrastructure, the Dodd-Frank Act also mandated that the CFTC develop position limits specifying the maximum number of derivative contracts, or deliverable quantity of a commodity, that an ‘eligible contract participant’ may hold in the swaps market (Greenberger 2011: 152f). Additionally, the Dodd-Frank Act established mandatory exchange-trading on a Designated Contract Market or a Swap Execution Facility for those ‘swaps’ that the CFTC designated as qualifying to be exchange-traded (Ferrarini and Saguato 2015: 581).

Each of these new regulatory areas intimately affected OTC commodity derivatives. First, all commodity ‘swaps’ were to be reported to a Swap Data Repository. Second, those commodity ‘swaps’ eligible to be cleared, and not subject to a clearing exemption, were to be centrally cleared. Third, margin requirements applied to all cleared commodity ‘swaps’, and to some uncleared commodity ‘swaps.’ And, fourth, commodity ‘swaps’ would count towards the position limits on an ‘eligible contract participant’s’ trading portfolio.

Nevertheless, to be subject to these regulatory requirements, an OTC commodity derivative would have to qualify as a ‘swap.’ Such qualification would occur against a background where a commodity derivative contract's unique attribute of potential physical deliverability of the asset referent rendered it *prima facie* a forward contract excluded from Dodd-Frank regulation, and where a commodity derivative contract's commercial purpose to commodity-related businesses could well exist. The CFTC codified, both in its rule defining a 'swap', and in a separate series of rules under the headings of "Commodity Options" and "Trade Options," its understanding of which OTC commodity derivatives would be regulated and how such an instrument would relate to the broader framework for regulated OTC derivatives. Exploring this understanding, and analyzing the influences upon it, serve as the focal points of this paper's rulemaking analysis.

CONCLUDING REMARKS

Emerging from the above review of the Commodity Futures Trading Commission's regulatory history, arguably, the most impactful issue that the CFTC faced was ambiguity surrounding the definition of a regulatable derivative contract as defined by the Commodity Exchange Act. This issue began confronting the Commission in the years immediately following its 1974 inception and, as detailed by Clark (1978) and Markham (2002) often involved the nebulous distinction between an unregulatable forward contract and a regulatable futures contract (as well as a potentially regulatable swap or other hybrid OTC derivative instrument). Nevertheless, the Commodity Futures Modernization Act of 2000 provided legal clarity to the Commission concerning its treatment of OTC derivatives; specifically, OTC derivatives were to (largely) be left unregulated. After the financial crisis, and through Title VII of the 2010 Dodd-Frank Act, Congress, however, ended the decade's long, legislatively established non-regulation of OTC derivatives by mandating that these instruments be subject to regulation.[171]

This new regulatory regime would apply to those OTC contracts that qualified as 'swaps', as broadly defined by the law (and as specifically defined in subsequent CFTC and SEC rule-makings). As explained in Chapter 1, a swap is generally conceived of as an agreement to exchange cash flows in the future (Hull 2014: 158). Title VII of Dodd-Frank, however, amended the Commodity Exchange Act to define a 'swap' not only in these terms, or in terms of instruments referred to as swaps in business practices, but also, in the context of OTC commodity derivatives. Dodd-Frank defined a 'swap' as any contract for the purchase or sale of a commodity which conveys an optional commitment to that purchase or sale.[172] This meant that the Dodd-Frank era definition of a 'swap', and, therefore, a regulatable derivative, would extend to swaps, options, and those OTC contracts containing optionality, so long as the implicated derivatives were neither a regulated futures contract nor a forward contract (specifically, those forward "nonfinancial commodity" contracts intended to be physically delivered).[173]

Notwithstanding uncertainty that would arise concerning regulatory treatment of OTC commodity derivatives that were physically settled, or of those OTC commodity contracts with embedded options or optionality (each subject to further rulemaking, as

[171] It should be noted that Dodd-Frank amended the Commodity Exchange Act by, among other ways, striking from the Act its Section 2(h)(1-7) language which had sanctioned the largely unregulated bilateral trading of OTC commodity derivatives and established Exempt Commercial Markets. Thus, through amending the Commodity Exchange Act, the Dodd-Frank Act subjected this form of trading to regulation and eliminated the legal recognition of these trading platforms. See Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)-(2) of the Commodity Exchange Act, 75 Fed. Reg. 56512 (2010) and Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 Fed. Reg. 56514 (2010).
[172] See Commodity Exchange Act § 4, 7 U.S.C. § 1a(47) (2010).
[173] Ibid.

explored below), the broad 'swap' definition provided by the Dodd-Frank Act, in part, addressed the central issue that the CFTC had dealt with from the time of its formation. Dodd-Frank set out a framework for what OTC derivatives could be regulated by the Commission. In doing so, the legislation provided an answer to the debate regarding the defining characteristic of a regulatable derivative instrument. As can be gleaned from Dodd-Frank's definition of a 'swap', what principally renders an OTC derivative regulatable, according to the Act, is its nature, and not where or how it is traded. It is the presence in a derivative contract of optionality – often in terms of deliverability or the physical and financial quantity of the asset referent to be purchased or sold – which determines the contract's initial fitness for regulation.[174]

Moreover, it can be posited that an imaginary emerges from the Dodd-Frank Act's central regulatory goals for OTC derivatives: the Dodd-Frank imaginary. This Dodd-Frank imaginary afforded regulators with a lens through which to view and guide their regulatory endeavors. The imaginary related to shining light on OTC derivatives and limiting systemic risk; thus, the corresponding regulations produced during rulemaking primarily sought to increase transparency and mitigate systemic risk in this marketplace. Over the course of the democratic process of rulemaking, however, CFTC policymakers' conception of what the Dodd-Frank Act meant in regard to the regulation of OTC commodity derivatives (i.e., the Dodd-Frank imaginary) would be modified due to changing semiotic and extra-semiotic supports. Nevertheless, by employing a Dodd-Frank imaginary, policymakers were assisted in "going on" with their complex rulemaking task by crafting regulations which generally sought to bring transparency to OTC derivatives and to reduce their attendant systemic risk.

[174] As Chapter 10 of this thesis will show, the definition of regulatability at the administrative agency level would, however, expand to encompass whether a counterparty to an OTC commodity derivative transaction was a commercial end-user (or non-swap dealer or non-major swap participant).

Yet, determining precisely which OTC commodity derivatives would be regulated for the purposes of increasing transparency and reducing systemic risk required further definition. Given that transactions in OTC commodity derivatives contemplate – at least to some degree – delivery of a physical asset (e.g., crude oil or copper) and can be undertaken by heterogeneous marketplace participants for either commercial (e.g., delivery of the commodity, or hedging) or non-commercial (e.g., speculative) purposes, adequately enunciating a distinction between those OTC commodity derivatives that would be regulated as ‘swaps’, and those instruments that would be either excepted or exempted from Dodd-Frank regulation, was imperative to the CFTC’s regulatory mission. This was done through the CFTC’s codification of rules defining the term ‘swap’. Establishing this definition was foundational for qualifying OTC commodity derivatives to be in compliance with the Dodd-Frank Act’s two main objectives. These being bringing increased transparency to the OTC swaps marketplace through transaction reporting and recordkeeping requirements and reducing systemic risk by regulating swap dealers and major swap participants as well as through adopting futures-style trading requirements for many OTC transactions, which involved the imposition of central clearing, margining, and position limit mandates.[175]

The remainder of this thesis’ Part III explores and analyzes the rules that brought OTC commodity derivatives under the CFTC’s regulatory umbrella.

[175] These terms are defined in Chapter 1.

THE BEGINNINGS OF OTC COMMODITY DERIVATIVE REGULATION: A REVIEW OF THE ADVANCE NOTICES OF PROPOSED RULEMAKING

Within weeks of President Obama's July 21, 2010 signing of the Dodd-Frank Act, the CFTC began its Dodd-Frank era OTC commodity derivative rulemaking process by promulgating advance notices of proposed rulemaking; thus, initiating what Yackee (2011) terms the 'pre-proposal rulemaking phase'. The two releases that served as the Commission's incipient foray into the construction of its approach to the regulation of OTC commodity derivatives were the August 20, 2010 joint advance notice with the SEC entitled "Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act" (hereinafter "Definitions"), and the September 28, 2010 "Agricultural Swaps" advance notice of proposed rulemaking. While the significance of the advance notices' use will be discussed in greater detail below, the issuance of such, rather than the more customary notice of proposed rulemaking, typically occurs whenever the potential rule-making is anticipated by administrative agency policymakers to necessitate an additional stage of informational exchanges with prospective regulatees and other stakeholders.[176] Also, it should be noted that while this review focuses on OTC commodity derivatives – the definition of which, as stated in Chapter 6, is synonymous with that of Exempt Commodities (i.e., energy and metals) – and not agricultural products, the "Agricultural Swaps" notice must be engaged because it was the initial rulemaking event from which the CFTC later developed its "Commodity Options" and "Trade Options" rules.[177] This chapter explores the two aforementioned advance notices, and the milieu in which they were developed, to

[176] This is usually done in connection with the agency's first sortie into the regulation of some object (Herz 2012: 643).
[177] After the "Agricultural Swaps" advance notice, the Commission included "Commodity Options" in the title of its subsequent proposed rule on agricultural swaps. These two components of the proposed rule were then bifurcated into separate final rules.

ascertain the key themes and considerations to Commission policymakers' pre-proposal OTC commodity derivative rulemaking efforts, and in doing so, highlights the use of the advance notices as a tool to assemble intellectual resources from regulatee comments as well as discusses the possibility that, through their speech acts, some CFTC officials actively encouraged regulatees (i.e., businesses utilizing OTC commodity derivatives) to impactfully inform and influence (i.e., capture) early rule-making.

The Advance Notices for OTC Commodity Derivative Rulemaking

The "Definitions" advance notice, jointly codified and promulgated by the CFTC and SEC, solicited comments from outside parties concerning "all aspects" of the Dodd-Frank Act's 'swap' definition for which the agencies, in consultation with the Board of Governors of the U.S. Federal Reserve System, were responsible to further define.[178] Through the notice, the agencies requested that commenters, over the course of a 30-day comment period, reflect "generally and specifically" on whether the regulators' 'swap' definition "should be based on qualitative or quantitative factors," in addition to asking the commenters to explain what such factors should be and the rationale for using them (i.e., "analogous areas of law, economics, or industry practice" and commenter experience with the to-be-regulated derivative instruments).[179] Aside from these requests for input, the advance notice consisted of a recitation of various Dodd-Frank Act definitions literally cut-and-pasted from the law.[180] No further guidance on the forthcoming 'swap' definition was given. Nevertheless, importantly for the regulation of OTC commodity derivatives, one of the quoted statutory definitions in the advance notice stated that sales of "a nonfinancial

[178] Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51430 (2010).
[179] Ibid.
[180] Ibid., at 51430-3.

commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled," were to be excluded from the agencies' 'swap' definition.[181]

The second rule-making relating to OTC commodity derivatives was the "Agricultural Swaps" advance notice. Pursuant to the Dodd-Frank Act, the Commission was required to develop regulations for agricultural swaps.[182] This advance notice was produced by the CFTC's self-styled 'Agricultural Swaps Rulemaking Team'; led by senior special counsel (attorney) Donald Heitman of the Commission's Division of Market Oversight.[183] The content of the release included an enumeration of the rationales for the enactment of the Dodd-Frank Act – among these being the enhancement of the CFTC's "rulemaking and enforcement authorities" as a part of reducing risk, increasing transparency, and promoting market integrity "within the financial system"[184] – and a review of both the existing statutory (Congressionally legislated) and regulatory (agency rule) frameworks governing transactions in OTC agricultural derivative instruments.

One aspect of the policymakers' assessment of these existing regulations is worth presenting here because of its relation to subsequent OTC commodity derivative rulemaking: its regulatory treatment of trade options (i.e., permissible commodity options, or over-the-counter commodity contracts containing an option that are offered to

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[181] This effectively created the forward contract exclusion from the 'swap' definition for certain qualifying OTC commodity derivative agreements. See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51430 (2010).
[182] Agricultural Swaps, 75 Fed. Reg. 59669 (2010).
[183] This is as stated by Heitman in his presentation before the CFTC's Agricultural Advisory Committee. See Agricultural Advisory Committee Meeting, 5 August 2010, Washington, D.C., at 277. Transcript available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/aac_transcript090510.pdf. As indicated by one CFTC interviewee, Heitman had been intimately working in the domain of agricultural commodities and their regulation since, at least, the 1970s (Interview, 3 October 2017, Washington, D.C.).
[184] Agricultural Swaps, 75 Fed. Reg. 59667 (2010).

commercial marketplace participants). Even after the passage of the Commodity Futures Modernization Act in 2000, the CFTC maintained plenary authority over OTC commodity options stemming from the agency's Part 32 regulation. Flowing from this authority, the CFTC continued a general ban on OTC commodity option transactions, but exempted from the ban those OTC commodity option agreements that qualified as 'trade options.'[185] This Part 32 exemption extended to both 'trade options' on agricultural products and to 'trade options' on other physical commodities. Thus, as detailed in the "Agricultural Swaps" advance notice, the Commission, at the time of Dodd-Frank's enactment, had existing regulatory schemes for trade options on both classes of consumable products.[186]

More specifically, as the advance notice stated, since 1998, the CFTC had allowed over-the-counter trading of 'agricultural trade options' pursuant to its Part 32 exemptive authority, provided that these 'agricultural trade options' were sold by a Commission-registered 'Agricultural Trade Option Merchant'.[187] Additionally, under this same authority, transactions in 'agricultural trade options' were sanctioned by the CFTC if they were (1) offered to "a producer, processor, or commercial user of, or a merchant handling" the agricultural commodity, (2) entered into "solely for purposes related to" the aforementioned commercial entity's business, and (3) contracted by parties whose individual net worth was "not less than $10 million."[188] The other part of the existing Part 32 exemptive scheme allowed for 'trade options' on other physical commodities. In particular, Part 32.4 of the Commission's pre-Dodd-Frank regulations permitted commodity-related trade options to transact so long as the option contract was "offered to a producer, processor, or commercial user of, or a merchant handling, the commodity" and

[185] Ibid., at 59667-8.
[186] Ibid., at 59668.
[187] Ibid.
[188] Ibid.

entered into by this entity “solely for purposes related to its business as such.”[189] The characteristics of these initial criteria for the regulation of trade options would later serve to inform (through an intertextual relationship), in part, the content of the subsequently analyzed trade (and commodity) option rule-makings. As will be discussed in the upcoming chapters, updating the Part 32 commodity option and trade option regulations to comply with the new Dodd-Frank Act would be a focal point in the CFTC’s efforts to cement the agency’s determination of which OTC commodity derivatives would be regulated.

Finally, like the “Definitions” release, the “Agricultural Swaps” advance notice solicited comments relating to the rulemaking from outside, interested parties. This notice, however, enumerated 27 questions directed at gathering data and information on agricultural swaps, ‘agricultural trade options’, and these instruments’ trading practices, in addition to asking the prospective commenters to provide insight into how the Commission should approach the regulation of these OTC derivative products.[190] Nevertheless, and importantly for the subsequently produced proposed rule, none of these questions pertained to non-agricultural derivatives (e.g., on other physical commodities, such as OTC commodity derivatives) in spite of the fact that a proposed rule for commodity options (see Chapter 8) would emerge from the “Agricultural Swaps” advance notice and would address the regulation of commodity (trade) options on other physical commodities. This meant that while rule-making for agricultural swaps was privy to interested party comment at this developmental stage of rulemaking, perspective was not formally solicited concerning updates to commodity (trade) option regulations. As will be posited in the next chapter, the lack of feedback on commodity (trade) option regulations influenced the selected regulatory approach for these derivative instruments during proposed rule-making.

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[189] Ibid.

[190] Ibid., at 59669-70.

A DISCUSSION OF THE ADVANCE NOTICES OF PROPOSED RULEMAKING

This section of the chapter examines the above cited advance notices, and related contextual considerations, to assess the key rulemaking themes that emerge during this pre-proposal stage of OTC commodity derivative rulemaking.

Two main themes relating to the "Definitions" and "Agricultural Swaps" advance notices are worth introducing here in order to establish how policymakers approached the construction of OTC commodity derivatives regulations during this pre-proposal period. The first is that the use of an advance notice arguably signifies that policymakers anticipated a complex and complicated rule-making for which they sought substantial data, information, and perspective from parties interested in the regulations to be formed. In this regard, the advance notices deployed by CFTC policymakers can be seen as a tool used for apprehending the intricacies of an OTC commodity derivative marketplace into which they historically had (at most) limited visibility and familiarity. The second is that through these releases, and during the bureaucratic events that surrounded their codification, Commission officials made it known that they were explicitly interested in the commentary of prospective regulatees as a source of information for the content of ensuing rules; thus, leaving open the possibility that the proposed rule-makings could be influenced to the benefit of such outside parties (i.e., captured by the regulatees). This also shows that at this pre-proposal rulemaking phase, agency policymakers placed emphasis on the views of these regulatees to develop a reservoir of intellectual resources on which they could potentially draw in later rulemaking events.

To the first of these two themes, the significance of the Commission's issuance of advance notices of proposed rulemaking should be further investigated. Recall that an advance notice allows for an additional, pre-proposal rulemaking stage during which interested parties can comment on the agency's preliminary regulatory efforts. Not all rules, however, begin with an advance notice. As indicated by Nelson and Yackee (2012: 344) and Yackee (2011: 379), in the absence of a Congressional directive, when an advance notice is used, it is often turned to because administrative agency policymakers perceive a need for further data and information or want to test the proverbial regulatory waters to seek an acceptable approach to regulation. Furthermore, as noted by Yackee (2014: 294), theoretically, the information procured from interested parties during this preliminary rulemaking stage can inform the content of the subsequent notice of proposed rulemaking.

Continuing with this analytical theme, the "Definitions" and "Agricultural Swaps" advance notices are a part of a particular documentary genre; one which both conveys significance when utilized and which conditions its textual contents. To the former, the significance of using advance notices of proposed rulemaking for the first forays into the regulation of swaps and OTC commodity derivatives stems from a perceived need for an additional rulemaking event to assist with fulfilling the regulatory mandates of the Dodd-Frank law.[191] As gleaned from the rulemaking summaries at the beginnings of both the "Definitions" and "Agricultural Swaps" releases, this perception is attributable to the following: the need for (1) the assistance in defining regulatory terms[192] and (2) insight on the "appropriate conditions, restrictions or protections"[193] of a regulatory structure. In short, the utilization of advance notices was viewed as necessary to procure outside party input requisite to developing proposed rules. To the latter aspect of the documentary genre, by its nature, an advance notice of proposed rulemaking circumscribes the extent of

[191] The Dodd-Frank Act did not require these rules to begin in advance notices. Thus, the use of this rulemaking tool was done out of the Commission(s) volition.
[192] Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51429 (2010).
[193] Agricultural Swaps, 75 Fed. Reg. 59666 (2010).

the potential content of which it is composed. This genre limits the content of an advance notice to discussions of legal authority, legislative and regulatory history, and importantly, various forms of solicitations (e.g., questions) prompting outside party comment on the regulatory matter(s). Given the above, an advance notice can, thus, be conceived of as a rulemaking tool utilized by policymakers in their effort to grasp the complexity and nuanced nature of their regulatory task.

As it relates to the style and content (i.e., the expressed discourse) of the "Definitions" notice itself, a couple noteworthy points about policymakers' construction of the early OTC commodity derivative rules can be inferred. From the text of this advance notice, which is limited to this restatement and corresponding requests for comments, data, and information relating to relevant definitions, the document style conveys the sense that CFTC policymakers perceived detailed commentary from outside parties as a foundational component to a complex rule-making. Moreover, given the broad language of the solicitation for such commentary (i.e., its principal discourse), it can be presumed that policymakers also anticipated that a panoply of regulatory issues might affect potential regulatees in connection with rule-making, and that these officials actively sought – through an expansive solicitation for comments – to be apprised of all these possible effects.

Additional insights into initial OTC commodity derivative rule-making come from exploring the style and content of the "Agricultural Swaps" advance notice. Given the structure of the release and the scope of topics on which it requested outside party comment – ranging from precise requests for OTC agricultural swaps data, to historical recollections and information on trading relations and practices, to asking for perspectives on how the Commission "should" regulate certain aspects of agricultural swaps trading[194] – policymakers ostensibly thought that, as with the "Definitions" advance notice, developing a proposed agricultural swaps rule would require a substantial contribution of data, information, and other commentary from external sources. Such contributions were conceivably to then produce the intellectual resources that could be used to inform the forthcoming proposed regulations.

Nevertheless, as the "Agricultural Swaps" notice contained an extensive review of the existing legislative and regulatory treatments for related OTC derivatives, it is apparent that CFTC policymakers were cognizant that some semblance of a regulatory structure for OTC (commodity) derivatives, such as trade options, was already available as a resource on which to base the Dodd-Frank compliant regulations of an eventual proposed rule. Although a precise enunciation of prospective regulatory treatments for these instruments was not included in the "Agricultural Swaps" advance notice, the acknowledgement by CFTC policymakers of various exemptive schemes already in-place for certain OTC commodity derivative instruments is, nonetheless, important. This is because subsequent rulemaking actions for commodity and trade options would include exemptive schemes similar to those discussed in this release and would not solely reflect the communications of interested party commenters.

Turning to contextual information that complemented the development of the two advance notices, the first item of relevance are the external meetings held by CFTC policymakers with outside parties. Although transcripts of these meetings do not exist, the Commission does make public a brief topical summary of such meetings, the meeting dates, the rulemaking(s) to which the meetings are connected, and a list of internal (CFTC) and

[194] Ibid., at 59669-70.

external parties attending such meetings. With regard to external meetings pertaining to definitional rulemaking(s), between July 21, 2010 – the date that Dodd-Frank was enacted into law – and the release of the "Definitions" notice, on at least two occasions, Commission officials met with outside parties.[195] And, from this same July date until the September 28, 2010 publication of the "Agricultural Swaps" notice, CFTC policymakers and external participants conferred over agricultural swaps-related matters in at least eleven meetings.[196] Notwithstanding the absence of meeting transcripts, it can still be surmised that, given the Commission's numerous interactions with external parties throughout this pre-proposal rulemaking stage, CFTC policymakers likely perceived a need for these meetings and that such exchanges were plausibly useful to Commission officials in their rulemaking responsibilities.

Another source of information that can provide perspective on the milieu in which fledgling OTC commodity derivative rulemaking took place is the August 5, 2010 CFTC Agricultural Advisory Committee meeting. (Although attended by non-CFTC participants, this was not an external meeting, but was a relatively routine convocation of Commission and industry members.) As the date suggests, this meeting transpired several weeks prior to the publication of the "Agricultural Swaps" advance notice. In attendance were Commission officials as well as individuals from the United States Department of Agriculture, and representatives from a variety of agricultural and derivative trading

[195] This figure was generated by searching through the CFTC's online 'External Meetings' database for results between the dates listed which the Commission identified as pertaining to "II. Definitions" rulemaking. Generally, financial firms and interest groups attended these meetings. This information can be accessed from the following: https://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings.

[196] This figure was generated by searching through the CFTC's online 'External Meetings' database for results between the dates listed which the Commission identified as pertaining to "XIX. Agricultural Swaps" rulemaking. Generally, agricultural firms, interest groups, and financial firms with agricultural interests attended these meetings. This information can be accessed from the following: https://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings.

businesses. Among topics covered at the meeting, which was chaired by CFTC Commissioner Michael Dunn, was a presentation by CFTC attorney Don Heitman concerning the agency's Dodd-Frank rulemaking efforts on OTC agricultural derivatives.

While a complete recitation and analysis of Heitman's remarks and ensuing participant comments will not be undertaken, it is, nonetheless, useful to present key threads of this portion of the meeting that are apposite to contributing to an understanding of those factors that may have influenced the construction of the new OTC commodity derivative regulations. The criterion used in selecting these motifs is their specific relation to the Commission's inchoate rulemaking efforts affecting such derivative instruments. As such, two items are discussed below: Heitman's remarks on the regulation of trade options, and the recurring solicitations of policymakers for prospective regulatee input.

Speaking in regard to how the Dodd-Frank Act's inclusion of 'options' in its definition of a regulatable 'swap' could affect existing Commission exemptions for certain OTC derivative products, Heitman referenced the CFTC's experience with trade options.[197] First mentioning 'agricultural trade options', Heitman stated that "the Commission's Ag [(agricultural)] trade options rules" had been "a complete and total failure," noting, as the corresponding advance notice of proposed rulemaking would later state, the ineffectiveness of the 'Agricultural Trade Option Merchant' program.[198] From there, Heitman described the various criteria by which 'agricultural trade options' and 'trade options' on other physical commodities had historically been exempted from CFTC oversight.[199] Yet, Heitman indicated that OTC trading in trade options on other physical commodities – such as "petroleum or gold or anything else" – would, under Dodd-Frank, no

[197] Agricultural Advisory Committee Meeting, 5 August 2010, Washington, D.C., at 272-5.
[198] Ibid., at 275.
[199] Ibid., at 275-6.

longer be covered by the "basic trade option provision" for exemption.[200] Thus, the agency would have to adopt a new exemption for these commodity-related transactions to legally continue trading.

An additional aspect from this meeting that is pertinent to this discussion of pre-proposal rulemaking is the repeated solicitation by CFTC officials for regulatee perspectives on the agricultural swaps rule-making task. At several junctures towards the end of Heitman's presentation, both he and Commissioner Dunn intimated the need for regulatees to provide the Agricultural Swaps Rulemaking Team – and, thus, the Agricultural Advisory Committee and the Commission – with thoughts and comments concerning the "Agricultural Swaps" advance notice. Commissioner Dunn made a point of interjecting at four instances to request that potential regulatees be in contact with the rulemaking team. On one occasion, Commissioner Dunn intimated to these regulatees that it would be "much better" if the team heard "from you early on [about] what you'd like to see in there" so as to "ensure what you'd like to see" in the proposed rule is "part and parcel of that recommendation."[201] Furthering this sentiment, the Commissioner stated the following:

> So, you're going to have direct input to the staff, and there are 30 of them, you'll see […] But they are there and that gives you the ground floor, and what I will commit to the members of the Advisory Committee is I'll have my staff let you know when key thresholds are coming up so that you can get in there […] As they begin to take pen to paper, now is the time to get your comments in there, because, believe me, it's a lot easier to get them in early on than after something is written. So, this is an opportunity and, as the Chair of the Ag Advisory Committee, I want to make sure that you all have as much input as you can into this major watershed in the way the Commission operates.[202]

[200] Ibid., at 276.
[201] Ibid., at 287.
[202] Ibid., at 291-3.

Don Heitman concurred with Commissioner Dunn's intimation, and encouraged regulatees to provide the CFTC with insight into their businesses' experiences with OTC derivatives so as to guide the Commission's rulemaking efforts: "…because speaking from the perspective of trying to put these rules together, you know, […] you guys understand how your business works better than we ever could, and *we're trying to write rules that make sense for your businesses*" (emphasis added).[203] In giving rationale to this statement, Heitman continued: "The better we understand your issues, your concerns, your problems, then the better we are able to write a rule that makes sense and works for you. So, again, the more background information we can get, the easier it makes our job and the better the rules are going to look from your perspective."[204] Moreover, Heitman directed the potential regulatees to a CFTC-hosted agricultural swaps webpage through which interested parties could comment on future rule-makings.[205] While the potential significance of these solicitations will be reviewed in the concluding remarks below, based on Heitman's and Dunn's statements, it is clear that those Commission policymakers involved in agricultural swaps rule-making perceived a critical need for informational input from prospective regulatees, and that these officials possibly facilitated an opportunity for such outside parties to impactfully influence the construction of the forthcoming (Commodity Options) proposed rule.

CONCLUDING REMARKS ON THE ADVANCE NOTICES OF PROPOSED RULEMAKING

The above discussion of the "Definitions" and "Agricultural Swaps" advance notices of proposed rulemaking has explored these releases and the milieu in which they were crafted to ascertain those considerations important to pre-proposal OTC commodity derivative

[203] Ibid., at 293.
[204] Ibid.
[205] Ibid., at 281-2 and 286-7.

rulemaking. In doing so, this chapter has opened the “black box” that, according to West (2009), characterizes this rulemaking phase.[206] This has revealed that Commission policymakers viewed their regulatory task as complex and nuanced and that they actively sought, through the issuance of these advance notices, the commentary of interested parties – especially from prospective regulatees – to assist with these efforts (i.e., an attempt to simplify the complexity of rulemaking). Given the new regulatory mandates prescribed by the Dodd-Frank Act, coupled with the CFTC’s historical (in)experience with the direct regulation of OTC (commodity) derivatives (as reviewed in Chapter 6), Commission policymakers likely did not possess either the breadth or the depth of industry-side perspective at the outset of Dodd-Frank rulemaking. To this point, one senior agency official intimated the following: “The regulations essentially put more meat on the bones of the law and fleshed it out. And in the case of Dodd-Frank, there were lots to flesh out because this was an entirely new area – the OTC market – that your regulators didn’t even fully understand, let alone members of Congress.”[207] And, in light of the changes that this law brought to the regulatory infrastructure for OTC (commodity) derivatives, encouraging interested parties – and, in particular, potential regulatees – to communicate their experiences with the CFTC conceivably allowed agency officials to more fully carry out their rulemaking duties under the Dodd-Frank Act.

Two important items from this chapter’s discussion are worth restating. As indicated above, utilizing advance notices provided CFTC policymakers with tools to gather data, information, and other commentary that could then be used towards the creation of

[206] It is important to remember, however, that the two advance notices do not represent rules or even an enunciation of how policymakers envisioned or intended to regulate OTC commodity derivatives. Rather, the notices represent an elective step in the rulemaking process which could both generate outside party feedback and lay out the basis for future development of proposed regulations.
[207] Interview, 9 October 2017, Washington, D.C.

proposed rules. While the precise intentions behind the policymakers' decision to utilize advance notices cannot be definitively established given the data reviewed herein, it can, nonetheless, be reasonably assumed that these officials understood the employment of advance notices as necessary and useful to their rule-making endeavors.

The other element pertains both to the significance of the numerous rule-related external meetings during the pre-proposal stage, and of the major theme of the Agricultural Advisory Committee's meeting – the solicitation of prospective regulatee input. Again, though transcripts of these external meetings do not exist, their summaries depict a relationship in which outside parties exchanged data, information, and perspectives concerning their OTC derivative experiences with the Commission. Moreover, the verbal observations and pleas of both Heitman and Commissioner Dunn during the Agricultural Advisory Committee's meeting imply that CFTC policymakers were actively seeking such input specifically from prospective regulatees. Considering that, as found by Yackee (2011), at this stage of rulemaking (i.e., pre-proposal/ advance notice) outside parties generally have success in influencing the nature of a subsequently proposed rule should they provide relevant commentary to an administrative agency, the intimations of these policymakers seemingly seek to encourage as much. Thus, these external meetings and the two policymakers' utterances may suggest an administrative agency at risk of capture (see Chapter 3) because of policymakers' seeming affinity for regulatee perspectives.

Nevertheless, a couple of qualifications must be considered. First, solicitations for input, and even statements whereby policymakers portend to write rules that "make sense" for regulatees, may not in and of themselves mean that regulators base their rules on the commentary provided by prospective regulatees. Although such solicitations and statements are noteworthy because they represent an apparent need by policymakers for external perspectives on rulemaking issues – thus, hypothetically, resulting in the creation of a reservoir of intellectual resources on which policymakers may draw when they draft regulations – these speech acts (i.e., observations, pleas, invitations) may in fact signify no more than an attempt to uncover the possible complexities of a regulatory task by encouraging regulatees to provide their insights on the matter at-hand (Jones 2007). Therefore, interactions between prospective regulatees and their future regulators – even when occurring to transmit intellectual resources – should not, on their surface, be assumed to signal some form of regulatory capture. Second, in some instances, policymakers craft rules that give substantial deference to potential regulatee comments and serve to advance these parties' interests (see Chapter 10). On other occasions, the regulations substantially reflect considerations other than those discussed by prospective regulatees, like the language of an overriding and explicit statute, or the agency's existing regulatory approach (see Chapter 8). As such, the actual regulatory content of the subsequently issued rules must be examined to determine the extent to which interested party commenters (or other influences) conditioned or affected an administrative agency's regulations.

The application of CPE to the ensuing phases of OTC commodity derivative rulemaking helps identify and assess those factors (semiotic and extra-semiotic) that conditioned or affected Commission policymakers' construction – as well as their selection and retention – of OTC commodity derivatives regulations. In the next chapter, those significant influences affecting the proposed OTC commodity derivative rules are explored and analyzed. Overlying this inquiry is the notion of a Dodd-Frank imaginary which guided CFTC policymakers towards bringing transparency to OTC commodity derivative transactions and limiting the marketplace's systemic risk.

Chapter 8 – The Proposed Rules for OTC Commodity Derivatives (2010-2011)

INTRODUCTORY REMARKS

Following the comment periods for the "Definitions" and "Agricultural Swaps" advance notices of proposed rulemaking, and stemming directly from these notices, two proposed rules were issued defining which OTC commodity derivatives would be subject to the Dodd-Frank regulatory regime for swaps. In separate rulemaking actions, the CFTC proposed the "Commodity Options and Agricultural Swaps" ("Commodity Options") rule on February 3, 2011 and, jointly with the SEC, issued the "Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" ("Further Definitions") proposed rule on May 23, 2011. As concerns this chapter's analysis, because both rules include regulations for financial products other than OTC commodity derivatives, only those parts of the rules pertaining to OTC commodity derivative regulation are analyzed and discussed. Thus, for the "Commodity Options" rule, the Commission's proposed regulations associated with commodity options (i.e., over-the-counter option contracts on commodities such as energy and metals) are included the analysis, but those pertaining to agricultural swaps are omitted. Similarly, only the forward contract exclusion within the "Further Definitions" rule is made part of the below analysis.

Through an analysis of how the proposed "Commodity Options" rule and the proposed forward contract exclusion defined which OTC commodity derivatives would be regulated, this chapter shows that CFTC policymakers constructed the regulation of these instruments in a way that brought much of this derivative activity under the Commission's purview and subject to Dodd-Frank swap regulations (i.e., compliance with reporting, recordkeeping, clearing, margining, and position limits requirements). As is presented below, this selected regulatory approach was principally conditioned by the discursive content of the Dodd-Frank Act which interacted and co-evolved with the extra-semiotic elements of the milieu in which the regulations were formed, such as the influence of agency Chairperson Gary Gensler. Notwithstanding the statements of agency policymakers reviewed in Chapter 7, the sway of industry-related external parties on the composition and content of the proposed regulations was negligible. Through the expansive and stringent regulatory approach that was selected for commodity (trade) options and for the forward contract exclusion, CFTC officials proposed regulations which sought to broadly bring transparency to the OTC commodity derivatives marketplace and to reduce the systemic risk thereof (i.e., the Dodd-Frank imaginary). As has already been alluded to, subsequent rulemaking events would, however, refine this imaginary and redefine what OTC commodity derivative transactions would be regulated under the umbrella of this regulatory vision.

This portion of the case study on the regulation of OTC commodity derivatives is structured differently from that of the preceding chapter. The most notable difference is that the first item discussed is the broader context in which the Commission began drafting OTC commodity derivative regulations. The opening section of this chapter reviews CFTC-specific considerations such as the leadership of Chair Gensler and the regulatory sentiments that he conveyed, the structure of intra-agency rulemaking teams, staffing and budget issues before engaging with the broader political environment in which the two proposed rule-makings took place. From there, the proposed "Commodity Options" rule and the forward contract exclusion of the "Further Definitions" rule are separately presented. Attached to this presentation are corresponding analyses of the rules' construction which, utilizing the analytical lenses afforded by the CPE theoretical framework, explore the semiotic and extra-semiotic influences thereon as well as the rules' relation to the Dodd-Frank imaginary.

AN OVERVIEW OF THE CONTEXT IN WHICH THE PROPOSED RULES WERE CREATED

Before engaging in an analysis of the proposed "Commodity Options" and "Further Definitions" proposed rule-makings, it is essential to discuss the immediate context in which these rules were drafted. The elements covered in this overview pertain to the CFTC as an institution – including the leadership of Chair Gensler – and to the political climate in which the agency was embedded (i.e., that of an elected U.S. government with authority over the Commission). These considerations will be later linked to the overall analyses of the two proposed rule-makings through the lenses of the four CPE selectivities: the structural, discursive, agential, and technological selectivities.

Beginning with the institutional-related variables present at the Commission during the proposed rulemaking stage, the initial factor to consider is that of agency leadership, and specifically, Chairperson Gary Gensler.[208] Because Barack Obama, a Democrat, was president at the time that the CFTC began Dodd-Frank era rulemaking, his political party held a three (Democrat) to two (Republican) voting majority at the agency. Furthermore, in 2009, Obama appointed Gary Gensler, a Democrat, to be Chairperson of the Commission. Although Gensler came from a professional background as a banker and former U.S. Treasury Department official, once confirmed into the position as head of the CFTC, he was a vociferous proponent of regulating the then (largely) unregulated OTC derivatives space.[209] As stated in multiple interviews with CFTC officials, Chair Gensler even actively

[208] The influence of CFTC leadership, including that of Chair Gensler, on the rule-makings reviewed below will be examined in greater detail through the CPE lens of the agential selectivity in the analytical sub-sections of this chapter.
[209] See: Timms, Aaron. "New CFTC Boss Timothy Massad Goes Soft on Regulation". *Institutional Investor*, 13 November 2014. Available at:

assisted Congress in its development of Title VII of the Dodd-Frank Act (i.e., the Act's regulation of swaps).[210] The vision that Gensler articulated for the Commission's regulation of OTC derivatives (swaps) is most aptly described in his final remarks during a 2012 interview with the then-prominent broadcast journalist Charlie Rose: As Gensler stated: "I do think that the American public will do best if we actually shine a light on these markets and lower the risk of them"[211] (i.e., a regulatory agenda guided by the aforementioned Dodd-Frank imaginary). In short, and as previously mentioned in Chapter 6, Chair Gensler was a champion of implementing the Dodd-Frank reforms, and was thus, given his chairmanship, the preeminent institutional actor directing the Commission's regulation of OTC derivatives under the Act during his roughly five-year tenure as leader of the agency.

The next factor pertains to how the agency structured its Dodd-Frank rulemaking efforts. After the Dodd-Frank Act was signed into law, the CFTC established 30 intra-agency teams that were responsible for writing Act-associated rules.[212] Each team was charged with a particular regulatory subject, such as the above-mentioned Agricultural Swaps Rulemaking Team being tasked with drafting rules for agricultural swaps and related OTC derivative products. Furthermore, given the panoply of disparate regulations that would be

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https://www.institutionalinvestor.com/article/b14zbk4fxwzkmq/new-cftc-boss-timothy-massad-goes-soft-on-regulation; Protess, Ben. "Regulator of Wall Street Loses Its Hard-Charging Chairman". *The New York Times*, 2 January 2014. Available at: https://dealbook.nytimes.com/2014/01/02/regulator-of-wall-street-loses-its-hard-charging-chairman/; and Warmbrodt, Zachary. "Obama picks Massad for CFTC". *Politico*, 12 November 2013. Available at: https://www.politico.com/story/2013/11/barack-obama-timothy-massad-commodity-futures-trading-commission-099705.

[210] Interview, 6 October 2017, Washington, D.C. and Interview, 10 October 2017, Washington, D.C.

[211] Gensler, G. (2012) Interviewed by Charlie Rose for *Charlie Rose*, 14 June. Available at: https://charlierose.com/video/player/14211?autoplay=true.

[212] CFTC Releases List of Areas of Rulemaking for Over-the-Counter Derivatives, Release Number 5856-10, 21 July 2010. Available at: https://www.cftc.gov/PressRoom/PressReleases/pr5856-10. Another team was subsequently added to bring the total to 31 rulemaking teams, see: Remarks, Implementing the Dodd-Frank Act, FIA's Annual International Futures Industry Conference, Chairman Gary Gensler, 16 March 2011. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-73.

developed by the intra-agency teams, a member of the Commission's Office of General Counsel was assigned to each team in order to limit the need for sequential rule reviews by the Office prior to the submission of the rule(s) to the agency's Commissioners for a vote.[213] According to a CFTC official, this processual structure was unique to Dodd-Frank rulemaking, and was done to prevent bottlenecks in the rule review process conducted by the Office of General Counsel.[214] Bearing these considerations in-mind is important because this structure may have, at times, facilitated what might be termed 'siloed' rule-making efforts within distinct groups, but at others, may have promoted inter-group coordination thorough Office of General Counsel members exposed to multiple rulemaking areas.

A further institutional consideration is that of agency staffing. Because the Dodd-Frank Act required that the CFTC assume added regulatory responsibilities in, among other areas, the domain of OTC derivatives (swaps), the Commission had to hire additional staff to assist in fulfilling its new rulemaking, oversight, and enforcement obligations.[215] Resulting from this increase in agency staff, three matters relating thereto are important to highlight.

First, although members of this newly hired staff presumably had diverse professional and educational experiences, as indicated in an interview with a CFTC official, the Commission had a proclivity towards hiring individuals who previously worked on Wall Street and whose backgrounds involved OTC derivatives (swaps). As the CFTC official stated: "Wall Street was laying people off. And we, in those early years, those very early years, the first few years of the Obama administration, where you had a sympathetic administration plus a Democratic Congress, we got the budget increases to hire-up so we

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[213] Interview, 10 October 2017, Washington, D.C.
[214] Ibid.
[215] Ibid., and see Opening Statement, Chairman Gary Gensler, Meeting of the Commodity Futures Trading Commission, December 16, 2010. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement121610.

were able to hire-up off the Street and get people in some swaps expertise" (Interview, 10 October 2017, Washington, D.C.). This phenomenon is noteworthy because of its potential to lay the foundation for possible regulatory capture. Specifically, 'cultural capture' (see Chapter 4) could be stimulated by these hiring practices because the new regulators – former Wall Street employees now with the CFTC – may continue sharing personal and professional identities with regulatees – businesses and their employees – and, thus, be inclined, as Kwak (2014: 83) suggests, to give deference, during rulemaking, to the perspectives of regulatees.

Relating to this hiring of new CFTC staff, the second matter pertains to the efficacy of these individuals' continuing knowledge of private industries' financial market operations and to their lack of familiarity with the rulemaking process. To the former, one CFTC interviewee spoke directly of an awareness that the knowledge accrued by newly hired personnel from Wall Street would quickly be outdated and would not be able to bridge the informational and experiential chasm that existed between the CFTC as regulator and financial interests as regulatees:

> Now, it's just inherent in any regulatory agency they're going to be one step removed from the Street […] We'll be behind the curve – the government's going to be behind the curve. And it's not a function of the people in government being more stupid, or more slow, or the best people not coming in. There is an incentive issue, too, in pay and all that [...] I would contend that you could take the brightest stars of Goldman Sachs and put them in a government agency and within a week their information is out dated and even they aren't going to be up on the latest. And you put them in a regulatory role and there's going to be a slight disconnect. It's just the nature of the distance in different organizations. And part of that's okay. And part of it's good in that you're not so close to the activity and so vested in. But, there is a distance (Interview, 10 October 2017, Washington, D.C.).

Therefore, while the new staff's past experiences may be perceived by some as constituting knowledge of the to-be-regulated industry, at least one senior member of the

Commission's Dodd-Frank rulemaking effort was skeptical of such a position and instead viewed the knowledge of these individuals as necessarily incomplete. And, to the latter item, another CFTC official posited that this fledgling staff's inexperience in writing rules adversely influenced their thoroughness and quality, which, in part, later prompted the Commission to issue to regulatees notices of relief from compliance with some agency regulations: "So, we did, you know, we hired people from the outside […] And again, they had to learn. Some of them didn't have any experience writing rules. I mean it was a very challenging process […] The combination of trying to do it quickly and then not having the knowledge, I think led to a lot of issues that needed to be addressed through the no-actions [letters]" (Interview, 3 October 2017, Washington, D.C.). These two caveats suggest that the CFTC's hiring of new staff was not unconditionally beneficial to its rulemaking and other regulatory endeavors.

The third staffing-related matter worth highlighting stands in slight contrast to the preceding caveats. As stated in interviews conducted for this research,[216] and as communicated in policymaker speeches from the time of the proposed OTC commodity derivative rule-makings,[217] some prominent CFTC officials believed that, notwithstanding the additional hiring done after Dodd-Frank's enactment, the Commission lacked adequate staff to properly rule-make and to fully engage in subsequent regulatory oversight and enforcement. Thus, key CFTC policymakers held the belief that the agency was understaffed

[216] Interview, 3 October 2017, Washington, D.C and Interview, 10 October 2017, Washington, D.C.
[217] See, for instance, Remarks before the Institute of International Bankers, Chairman Gary Gensler, 21 October 2010. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-56. See also Opening Statement, Commissioner Michael V. Dunn, Public Meeting on Proposed Rules Under Dodd-Frank Act, 19 November 2010. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/dunnstatement111910.

relative to its increased regulatory responsibilities. (In fact, only in the months after Dodd-Frank's July 2010 adoption did the CFTC's staff level return to its 1999 levels.[218])

Another institutional-related variable that should be kept in-mind is the Commission's budget situation at the time of formal rulemaking. In addressing this during several speeches in 2010, Chairperson Gensler articulated a need for further monetary resources in order for the agency to implement prescribed Dodd-Frank Act regulations.[219] On these same occasions, Gensler indicated that while President Obama and the Democrat-controlled Senate had each proposed appropriating more than $250 million to the CFTC for the fiscal year ending mid-2011, the Commission was, in fact, operating on an annualized budget of roughly $169 million, provided for by a Congressionally-enacted Continuing Resolution for government funding. This modest actual budget, relative to the proposed budgets of the President and the Senate, limited, among other things, the number of personnel that the CFTC could hire in conjunction with its expanded regulatory role over the OTC derivative marketplace. Although establishing a definitive link between specific agency funding levels and rulemaking outcomes is beyond the scope of this paper, it is, nonetheless, plausible that, as suggested by the Chair's speeches as well as the above-mentioned interviews, a restricted CFTC budget may have had some deleterious impact on the agency's ability to meticulously rule-make.

[218] See: Protess, Ben. "Regulators Decry Proposed Cuts in C.F.T.C. Budget". *The New York Times*, 24 February 2011. Available at: https://dealbook.nytimes.com/2011/02/24/regulators-decry-proposed-c-f-t-c-budget-cuts.

[219] See the following: Remarks before the Institute of International Bankers, Chairman Gary Gensler, 21 October 2010; Testimony, Chairman Gary Gensler, Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Securities, Insurance, and Investment and Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, 8 December 2010. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-63; Testimony, Chairman Gary Gensler, House Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management, 15 December 2010. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-64.

Broader than these institutional variables, the political climate in which the Commission formulated proposed rules from late-2010 through mid-2011 is also important. Since the 2008 general election, the presidency, the House of Representatives, and the Senate were controlled by the Democrat party; the political party responsible for drafting the Dodd-Frank Act and a group often amenable to increasing government spending. In the autumn 2010 midterm election, however, Republicans took control of the House and made significant gains in the number of seats held in the Senate.[220] Although the CFTC, as an administrative agency, is under the Executive Branch – thus Democrat-controlled even after the 2010 midterms – this election, nonetheless, had political implications for its operations. Of these, perhaps the most salient was found in the threats leveled by Republicans on the House Appropriations Committee to cut the Commission's budget by a third.[221] This proposed cut was in-keeping with the Republicans' more general post-midterm push towards promoting deregulation and implementing fiscal austerity.[222] Beyond rulemaking, the hypothesized effect of the budget cut would, as stated by Commissioner Chilton, likely render the CFTC unable to enforce the rules it was writing.[223] With the experience of this change in political environment in-mind, as well as the change's potential attendant material effects on the agency's budget and its ability to carry out its regulatory mission, an

[220] In the House, the Republicans picked up 63 seats to attain a majority, and in the Senate, Democrats lost 6 seats to retain a slim majority of 51 seats (plus 2 Independents who caucused with them) out of 100. For election data on the House, see: https://www.nytimes.com/elections/2010/results/house.html. For election data on the Senate, see: https://www.nytimes.com/elections/2010/results/senate.html.

[221] See: Protess, Ben. "Regulators Decry Proposed Cuts in C.F.T.C. Budget". *The New York Times*, 24 February 2011. Available at: https://dealbook.nytimes.com/2011/02/24/regulators-decry-proposed-c-f-t-c-budget-cuts. Again, it should be reiterated that at the time this cut was proposed, the CFTC was functioning on a budget that was already more than $80 million less than those proposed by President Obama and the Senate.

[222] The push for fiscal restraint would, in-time, influence the discourses and policies of both political parties in favor of such austerity (Blyth 2013).

[223] See: Protess, Ben. "Regulators Decry Proposed Cuts in C.F.T.C. Budget". *The New York Times*, 24 February 2011. Available at: https://dealbook.nytimes.com/2011/02/24/regulators-decry-proposed-c-f-t-c-budget-cuts.

ethos of urgency to complete Dodd-Frank rule-makings emerged at the Commission, given some policymakers' concern that shifting political sentiments could result in their work going unfinished or, perhaps, even completely undone, if it was not quickly finalized.[224]

THE PROPOSED RULES AND THEIR ANALYSES

The Proposed Rule for Commodity Options

Like its regulatory antecedent, the "Commodity Options" rule was produced by the CFTC's Agricultural Swaps Rulemaking Team.[225] As the proposed rule's full title denotes, it dealt with the regulation of agricultural swaps and commodity options. The inclusion of commodity options[226] in this proposed rule is noteworthy because although it was an outgrowth of the "Agricultural Swaps" advance notice, nowhere in that notice did Commission policymakers expressly contemplate revising commodity option regulations and, thus, comments relating to commodity options were not directly solicited by the agency. The matter of revisiting the agency's regulation of commodity options was not, however, unwarranted. Adding these regulations to the proposed rule was undertaken after reflection by the Agricultural Swaps Rulemaking Team on the extent to which the 'swap' definition in the Dodd-Frank Act included OTC commodity derivatives that were options, or that contained optionality (i.e., commodity options and trade options[227]).[228]

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[224] Interview, 3 October 2017, Washington, D.C. and Interview, 4 October 2017, Washington, D.C.
[225] The "For Further Contact Information" entry for the proposed rule is the same as that of the advance notice; thus, referencing the same policymakers. See Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6095 (2011).
[226] An option on a physical commodity (traded OTC) or on a futures contract for a commodity (traded on an exchange). See: https://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm#C.
[227] Trade options being commodity options that are transacted between commercial participants for commercial purposes (e.g., an option offered by an oil producer to a refinery for the purchase 50,000 barrels of crude oil). Such transactions were allowed by the CFTC under the trade option exemption of its Part 32 regulations; see Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6102 (2011).
[228] Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6101 (2011).

The regulations in the "Commodity Options" proposed rule mirrored this important aspect of Dodd-Frank's 'swap' definition. The hallmark of this proposed rule was that it modified the CFTC's Part 32 regulation of commodity (trade) options so as to treat these over-the-counter transacted instruments synonymously with swaps in the same manner stated in the Act.[229] As a result, those OTC commodity derivative contracts which had historically transacted as commodity (trade) options would now be considered regulatable swap agreements and subject to Dodd-Frank's post-trade regulatory infrastructure (i.e., reporting, recordkeeping, clearing, margining, and position limit regulations).

Beyond articulating the fungible nature of the terms option and swap,[230] the proposed "Commodity Options" rule also revised the Commission's existing Part 32 regulations, which had governed over-the-counter trading in commodity options since the 1970s. Several sections of the original Part 32 were suggested to be withdrawn because of either their contemporary irrelevance – such as regulations governing the defunct 'dealer options' market – or their preemption by the Dodd-Frank Act.[231] What policymakers proposed to retain and amend in Part 32 were its applicable scope (i.e., to all commodity options other than those on futures contracts), the trade option exemption,[232] consumer protection and anti-fraud provisions, and the grandfathering of existing commodity option transactions.

Notwithstanding cosmetic changes to the scope, consumer protection, and grandfather sections of Part 32, the proposed "Commodity Options" rule, through its revision of the trade option exemption, accomplished two significant changes to the

[229] Ibid., at 6096-7, 6101.
[230] In accordance with the Dodd-Frank Act, the CFTC did not, however, consider options on futures contracts as swaps. See Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6095 (2011).
[231] Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6101-3 (2011).
[232] As previously discussed, this CFTC exemption allowed for commercial marketplace participants to transact otherwise banned over-the-counter commodity options.

regulation of commodity (trade) options. First, although commodity (trade) options would be allowed to legally transact under the amended trade option exemption, the nature of this exemption given the corresponding treatment of commodity (trade) options as swaps, meant that it did not exempt such transactions from regulation as swaps. In short, this proposed trade option exemption provided no exemptive relief from swap regulations to over-the-counter transacted commodity (trade) options, leaving these instruments subject to potentially costly regulatory compliance. Second, CFTC policymakers proposed revising the qualifying criteria for the trade option exemption to include that both purchasers and sellers of commodity (trade) options be 'eligible contract participants' as defined in and as required by law.[233] This meant that only those commercial parties meeting a *de minimis* (minimum) financial criterion would be legally permitted to transact these OTC commodity derivatives; potentially leaving small commercial end-users of these contracts unable to lawfully transact them.

All five CFTC commissioners voted in the affirmative to ratify the proposed rule. In the only voting statement given, Chairperson Gensler voiced his support for treating commodity options (and agricultural swaps) the same as all other swaps, citing the "overwhelmingly" supportive comments for this equal regulatory approach received from interested parties after the publication of the "Agricultural Swaps" advance notice.[234] A 60-day comment period was then applied to the proposed "Commodity Options" rule.

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[233] Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6102 (2011). The initial definition of an 'eligible contract participant' was understood to be that of a sophisticated investor, but following the adoption of the Dodd-Frank era rule concerning entities eligible to transact swaps, the definition changed to those businesses with $10 million or more in total assets, individuals with aggregate investments of $10 million or more (or $5 million of more if involved in hedging activities), and business entities involved in hedging commercial risk that have a net worth of at least $1 million, among other enumerated entities; see Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 75 Fed. Reg. 80184-5 (2010).

[234] Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6109-10 (2011).

An Analysis of the Proposed "Commodity Options" Rule

To reiterate, the proposed "Commodity Options" rule amended the Commission's Part 32 commodity options regulations in three substantial ways: (1) it proposed treating commodity options as regulatable swaps; which (2) meant that the trade option exemption did not exempt trade options from regulation as swaps; and (3) it included an 'eligible contract participant' requirement in the trade option exemption. In the instant sub-section of this thesis, the semiotic and extra-semiotic influences which conditioned CFTC policymakers' selection of their proposed regulatory approach to commodity (trade) options will be analyzed, before engaging with how that regulatory approach related to the overarching Dodd-Frank imaginary guiding agency officials towards bringing transparency to OTC derivative markets and reducing their contribution to systemic risk. In doing so, insight will be gained into how policymakers, at the notice of proposed rulemaking stage, constructed their preliminary regulations for OTC commodity derivatives.

In undertaking this proposed rule's analysis, an essential item concerning the absence of one potential factor on its development must first be explored. Because Commission policymakers did not directly solicit comment on the regulation of commodity options in the "Agricultural Swaps" advance notice, no comment letters on the topic were ever submitted to the agency. As intimated above, notwithstanding this absence, the CFTC's Agricultural Swaps Rulemaking Team proceeded to include commodity options in the proposed rule. The statements of agency policymakers within this rule's text cite their post-advance notice realization that the Dodd-Frank Act would impact commodity options regulations as the justification for ultimately revising these regulations.[235] As such, the formulation of proposed regulations for commodity options was done in an environment

[235] Ibid., at 6101.

which lacked the formally provided intellectual input (i.e., comment letters) of outside parties interested in these instruments' regulation; the effects of which are most prominent in the proposed trade option exemption and will be analyzed below. Nevertheless, since the commodity options regulations emerged from the same rulemaking as those for agricultural swaps, in addition to being contemporaneously crafted by the same rulemaking team, the potential discursive influences of agricultural outside party comments to the broader commodity options and agricultural swaps rulemaking ecosystem can, where applicable, be considered as a part of the proposed commodity options regulations. This specifically pertains to those agricultural swap-related comment letters that articulated support for equal treatment of options as swaps across all asset classes (e.g., agricultural options and commodity options).

As it relates to the proposed "Commodity Options" rule's treatment of commodity (trade) options as swaps, attention must preliminarily focus on Commission policymakers' understanding of the extent of the Dodd-Frank Act's 'swap' definition. The Act unambiguously states that "option[s] of any kind" on commodities are to be considered regulatable swaps.[236] Additionally, as mentioned above, the CFTC policymakers responsible for developing the "Commodity Options" rule refer to the clear language of the Act as the justification for adopting this expansive position. This indicates that agency officials' proposed treatment of commodity options as swaps was principally discursively conditioned by the language of the overarching Dodd-Frank statute. Moreover, this can be seen as resulting in an intertextual (and interdiscursive) relationship existing between the Act's 'swap' definition, which included options, and Commission policymakers' similar view codified by the CFTC in the proposed "Commodity Options" rule.

[236] See Commodity Exchange Act § 4, 7 U.S.C. § 1a(47) (2010).

A secondary semiotic influence on this element of the "Commodity Options" rule arises from the positions advanced in some of the agricultural swaps-related comment letters. Although such letters specifically pertained to agricultural derivative issues, when viewed holistically within the combined commodity options and agricultural swaps rulemaking organized by the Agricultural Swaps Rulemaking Team, they can be understood to provide positional discourses that correspond with the first change that Commission policymakers made to the agency's Part 32 regulations. For instance, a consortium of agricultural interest groups urged the CFTC to "treat swaps for *all* commodities harmoniously"; thereby advocating for uniform regulations across commodity swap (and option) asset classes (e.g., OTC sorghum, wheat, crude oil, and electricity derivatives).[237] Furthermore, another letter by a group of large banks expressed to the Commission its view that swaps and options should be treated "consistently."[238] While the language of the Dodd-Frank Act was, arguably, the main semiotic influence on CFTC policymakers' selection of an equivalent regulatory treatment for swaps and commodity (trade) options, the positional discourses in these agricultural swaps-related comment letters advocated for and affirmed an exact same view.

Similar semiotic relationships were plausibly present with the proposal to include an 'eligible contract participant' requirement in this rule's trade option exemption. For instance, the Dodd-Frank Act stipulated that only those entities that qualify as 'eligible contract participants' may transact OTC swaps (e.g., commodity and trade options given the

[237] Letter from Christine M. Cochran on behalf the American Farm Bureau Federation, the American Soybean Association, the Commodity Markets Council, the National Association of Wheat Growers, the National Cattlemen's Beef Association, and the National Corn Growers Association, 28 October 2010. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26350&SearchText=.

[238] Letter from Paul J. Pantano, Jr. McDermott, Will & Emery on behalf of the Agricultural Commodity Swaps Working Group, 29 October 2010, at 5. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26360&SearchText=paul.

CFTC's proposed equivalence).[239] As stated in the proposed "Commodity Options" rule, agency policymakers' inclusion of this requirement in the trade option exemption was done under the rationale of harmonizing the content of the exemption with the overarching statute.[240] Thus, here again, an intertextual (and interdiscursive) relationship likewise existed between the language of the Act and the addition of the 'eligible contract participant' requirement into the trade options exemption of the proposed rule. Furthermore, at least one agricultural swaps-related comment letter provided support to this addition, advocating for consistent regulatory treatment of swaps and option.[241]

It should be noted that although such stakeholders' advocacy for this regulatory consistency can be understood as a function of their interpretation of Dodd-Frank, it can also be seen as advancing a position in their interest. Namely, pursuing a relatively simplified regulatory landscape that avoids having disparate rules governing the transaction of different OTC derivative asset classes; thus, possibly limiting some compliance costs for regulatees. While prior speech acts of Commission policymakers might suggest that the "Commodity Options" rule would, in part, be crafted to reflect the interests of potential regulatees (see Chapter 7), as this analysis has thus far shown, the dominant semiotic influence on these two analyzed aspects of the CFTC's proposed commodity options regulations was the language of the Dodd-Frank Act; with the perspectives of agricultural-related interested party commenters serving a complementary role.

Through this proposal to consistently apply the language of the Dodd-Frank Act in rule form, the proposed "Commodity Options" rule, as indicated above, would also treat

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[239] Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6097 (2011).
[240] Ibid., at 6102.
[241] Letter from Paul J. Pantano, Jr. McDermott, Will & Emery on behalf of the Agricultural Commodity Swaps Working Group, 29 October 2010, at 5. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26360&SearchText=paul.

trade options synonymously with swaps because of the presence of optionality in these OTC commodity derivatives. While the pre-Dodd-Frank trade option exemption had allowed for the unregulated transaction of trade options, given this proposed regulatory treatment, these derivative instruments would *de facto* no longer be unregulated and would be subject to the gamut of Dodd-Frank swap regulations. This marked a significant deviation in Commission policy towards trade options, rupturing decades of agency precedent. Moreover, in the context of the trade option exemption and its effects thereon, it also denoted a strict application of the meaning of the Dodd-Frank Act – i.e., bringing transparency to and mitigating the systemic of regulatable OTC derivatives, such as swap-equivalent commodity (trade) options. As a consequence, even trade option transactions executed by commercial marketplace participants (e.g., a potash mining company) that had historically been unregulated for most of the CFTC's existence would be treated equivalently with a credit default swap entered into by a systemically important financial institution. The primacy of the applied language of the Act can again be seen in these transformative effects on the Commission's trade option exemption.

Nevertheless, it is essential to consider the impact that the above referenced lack of pre-proposal comment letters pertaining to the regulation of commodity (trade) options may have had on the CFTC's selected regulatory approach. In short, because the "Agricultural Swaps" advance notice – from which the proposed "Commodity Options" rule emerged – did not solicit comment on commodity (trade) options, the agency effectively partook in proposed rule-making in a discursive environment in which the formal communications (i.e., comment letters) of parties interested in commodity (trade) options were non-existent. This implies that policymakers' conception of how Dodd-Frank applied to these OTC commodity derivatives at this rulemaking juncture could neither be formally informed nor contested by the comments of stakeholders and other interested parties.

Evidence for this comes from the cost-benefit analysis conducted for this proposed rule by the Agricultural Swaps Rulemaking Team. As stated therein, policymakers did not overtly anticipate that the *de facto* withdrawal of the exemptive power of the trade option exemption, via the treatment of an option as a swap, would impose costs on those entities relying on the exemption.[242] Furthermore, in discussing the possible benefits of this regulatory proposal, officials from this team overwhelmingly focused on the benefits that treating commodity (trade) options as regulatable swaps would provide to the public, such as the effects of transparency and systemic risk reduction intended by the Dodd-Frank imaginary.[243] In neither the analyses of the costs nor of the benefits were the perspectives of prospective regulatees considered; there was no direct semiotic influence from these stakeholders. Yet, as will be seen in the next chapter, there were potentially significant costs to a multiplicity of such regulatees associated with the proposed regulations. And, as will also be seen, through comment letters, these parties did successfully advocate for a trade option exemption which removed commodity (trade) options from some parts of the Dodd-Frank Act.

Turning to those extra-semiotic factors which likewise conditioned CFTC policymakers' selection of the aforementioned proposed approach to the regulation of commodity (trade) options, and which interacted and co-evolved with the above discussed semiotic variables, these can be examined through CPE's four posited selectivities: structural, discursive, agential, and technological (see Chapter 4). Beginning with the structural selectivity, three aspects should be explored. First, the statutory authority (and limitations) imposed by the Dodd-Frank Act on the Commission's rulemaking efforts enabled (and circumscribed) the extent to which agency policymakers could regulate

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[242] Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6101 and 6105 (2011).
[243] Ibid., at 6105.

commodity (trade) options; thus necessitating compossibility between the content of the codified regulations of the proposed “Commodity Options” rule and the available regulatory structure allowable under the Act. Second, the composition of the CFTC’s commissioners was such that the typically pro-reform Democrats (including Chairperson Gensler) held a (3 to 2) majority in the agency. While all five commissioners voted in favor of adopting the proposed “Commodity Options” rule, it can be assumed that, given their votes, these policymakers, at this proposed rulemaking juncture, seemingly agreed that commodity (trade) options should be strictly regulated in accordance with Dodd-Frank.

Third, and more narrowly, the existence of the Agricultural Swaps Rulemaking Team as a distinct entity may have, at times, precluded its members from fully grasping the complexities of related rule-makings done by other teams. The effect of this being that, at the stage of proposed rulemaking, team policymakers may not have completely appreciated the potential interactions with and ramifications of concomitantly crafted OTC commodity derivative regulations. For instance, as indicated in the text of the “Commodity Options” rule, the Agricultural Swaps Rulemaking Team did not factor into its decision-making the potential impact of forward commodity contracts with embedded options (see below) on the proposed trade options scheme.[244] This was because the team viewed such issues as being separate from its rulemaking responsibilities,[245] even though the regulation of such forward contracts was intrinsically tied to regulating commodity options as similar regulatory issues arose for both OTC commodity derivative instruments. Additionally, this could have been exacerbated by the order in which the “Commodity Options” and “Further Definitions” rules were made. At the time that the proposed “Commodity Options” rule was passed by the CFTC, the proposed financial product definitions rule – i.e., the “Further

[244] Ibid., at 6100.
[245] Ibid.

Definitions" rule – had not yet been completed. Thus, by virtue of the order of rulemaking, the Agricultural Swaps Team had to draft its regulations with nebulous and fluid legal terminology; this limiting the possible completeness of the proposed "Commodity Options" rule. As one senior policymaker noted: "We didn't start with the basic definitions, so it made everything very difficult because we hadn't even defined certain things that we were then prescribing rules around" (Interview, 4 October 2017, Washington, D.C.).

In terms of the discursive selectivity, the Dodd-Frank Act served as the wellspring from which CFTC policymakers drew language to modify the agency's commodity (trade) option regulations and to broach such alterations in the proposed "Commodity Options" rule. While (agricultural derivative-related) comment letters advocating for equal treatment of options and swaps, and for the adoption of the 'eligible contract participant' requirement were cited in the proposed rule, ultimately, as the policymakers who drafted the rule stated, it was the need to comply with the language of the overarching statute that prompted the proposal of these regulatory modifications. Moreover, given the absence of comment letters from prospective regulatees to the proposed commodity (trade) option regulations, the language of the Act regarding the treatment of these OTC commodity derivatives was effectively unimpeded in achieving discursive hegemony over such regulations' content.

From the standpoint of the agential selectivity, the Agricultural Swaps Rulemaking Team that drafted the proposed commodity (trade) option regulations did not initially endeavor to do as much, but changed tune after further reflection on the matter. Thus, it can be assumed that this group of policymakers were both empowered and able to undertake this expansion in rulemaking responsibilities. While this may suggest that the team had autonomy over the development of the proposed "Commodity Options" rule, it is, nonetheless, important to consider their rulemaking efforts in conjunction with the articulated Dodd-Frank era vision of Chairperson Gensler, which was to bring transparency to and reduce the systemic risk of OTC derivatives. As constructed, the proposed "Commodity Options" rule reflected the principles of the Chair's mission for the regulation of OTC derivatives, and thus suggests the influence of Gensler's broad regulatory vision on the Agricultural Swap Rulemaking Team's drafting of this proposed rule.

With regard to the technological selectivity, one major item should be noted: the lack of commodity (trade) option-related comment letters. As stated above, the absence of commodity (trade) option-related comment letters did significantly influence Commission policymakers' rulemaking efforts. Without the intellectual resources and insight provided by these letters (i.e., data, information, and perspective they convey), agency officials could not formally take into consideration the commentary of interested parties (and of prospective regulatees, in particular) when they drafted their regulations for commodity (trade) options; potentially leaving policymakers unaware of the efficacy of maintaining a trade option exemption from swap regulations for OTC commodity derivatives.

Finally, as it relates to the Dodd-Frank imaginary that has been alluded in this chapter, the foregoing analysis indicates that this imaginary arguably guided the regulation of commodity (trade) options towards a regulatory structure that sought to bring transparency to these OTC commodity derivatives and to mitigate their contribution to systemic risk. The proposed "Commodity Options" rule intended this by subjecting commodity and trade options to the same regulations governing swaps through its proposal to treat these two classes of derivatives equivalently: they were all swaps because they contained optionality and would, thus, be subject to compliance with the Dodd-Frank Act's transparency (i.e., reporting and recordkeeping) and systemic risk reduction (i.e., clearing, margining, and position limits) requirements. The selection of this regulatory approach, and its overall construction, was influenced by interacting and co-evolving semiotic and extra-semiotic variables present during the development of the proposed “Commodity Options” rule. As explored above, these comprised the Dodd-Frank Act in both its language and the statutory structure intersecting with a distinct, agriculturally-minded rulemaking team which sought to follow the Commission’s Dodd-Frank regulatory goals (as articulated by Chairperson Gensler), but did so without formally procured outside intellectual resources (i.e., comment letters from prospective regulatees and other stakeholders) pertaining to the matter for which the proposed regulations related (i.e., commodity/trade options).

The Forward Contract Exclusion of the Proposed “Further Definitions” Rule

The “Further Definitions” proposed rule provided, among other things, an initial definition of the term ‘swap’, and interpretive guidance on several corresponding and anticipated regulatory issues. Included in this proposed release was CFTC guidance on the applicability of the ‘swap’ definition to forward contracts in nonfinancial commodities (i.e., OTC commodity derivatives). This guidance took the form of a proposed forward contract exclusion.[246] While a forward contract exclusion had traditionally been a part of the Commission’s futures regulatory infrastructure – whereby forward contracts would be excepted from the exchange-trading requirement applicable to futures contracts – the exclusion of the proposed “Further Definitions” rule sought to apply this system to forward agreements in the context of the new Dodd-Frank swap regulations. The CFTC’s recontextualization and interpretation of this exclusion was necessary given the Dodd-

[246] Although SEC policymakers ostensibly consented to and partook in the development of this interpretive guidance, as the asset referent – nonfinancial commodities – for this regulatory guidance fell within the CFTC’s jurisdiction in accordance with the Commodity Exchange Act, the claim that this was ‘the CFTC’s guidance’ can be safely made.

Frank Act's language that "a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled,"[247] could not be treated as a regulatable swap (see Chapter 7). Additionally, unlike the commodity option regulations put forth in the proposed "Commodity Options" rule, this forward contract exclusion was issued as interpretive guidance[248] and was associated with a request for comment in the "Definitions" advance notice, and with comments received in connection with this release.

Two key aspects of the CFTC's proposed forward contract exclusion to the 'swap' definition are important to discuss. The first of these deals with how the Commission proposed classifying forward contracts in nonfinancial commodities – such as crude oil and electricity – whenever trading in such might function like swap contracts.[249] Policymakers prefaced their interpretation of this situation by stating that veritable OTC commodity forward contracts were "commercial merchandising transactions" – e.g., an order for replacement of home windows – whose primary purpose is to "transfer ownership of the commodity" and not "solely its price risk," and that the CFTC had historically treated them as excluded from regulation derivative instruments (i.e., qualifying for the forward contract exclusion).[250] These officials noted that while the Dodd-Frank Act now required an OTC

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[247] Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51430 (2010).

[248] An interpretive guidance is a textual genre which consists of an administrative agency's explanation or clarification of a statute or regulation. While there exists substantial debate among legal scholars as to whether such guidance creates a binding and enforceable regulation (see Epstein 2016), because the forward contract exclusion was part of statutorily directed rulemaking, was contained within a rule, and was itself subject to notice-and-comment, it is arguably, when applied by regulatees, tantamount to an agency regulation.

[249] Recall that with the forward contract, a fixed amount of a commodity is purchased or sold at a specific future date. A swap, however, contains a variable (optional) commitment to at least one contractual component of an agreement for the future purchase or sale of a commodity. See Chapter 1 for further information.

[250] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29828 (2011).

commodity derivative be "intended to be physically settled" to qualify for the forward contract exclusion, given the Commission's historical use of intention to deliver as a criterion to assess a contract's fitness for the exclusion,[251] the new language of the Act affirmed what the CFTC had practiced, and sanctioned the Commission's use of this criterion to assess future OTC commodity derivative transactions.[252] Thus, the CFTC would continue to exclude from its regulatory purview those OTC commodity derivative contracts which genuinely intended to deliver the contract's underlying asset referent(s), subject to the application of a (traditionally applied) "facts and circumstances test" to discern the "expectations or intent" for physical settlement.[253]

Relating to this issue of delivery, and in response to commenter requests for clarification, Commission policymakers, in the proposed forward contract exclusion of the "Further Definitions" rule, provided guidance on the CFTC's 1990 Brent Interpretation and its 1993 'Energy Exemption' (see Chapter 6 for a discussion of both) in light of Dodd-Frank. In the case of the Brent Interpretation, commenters were concerned that 'book-out' transactions (i.e., cancellation agreements), which the Commission had determined in 1990 to be excluded from regulation forwards (see Chapter 6),[254] could fall within the scope of the 'swap' definition given that these transactions were often intentionally entered into to extinguish delivery obligations of Brent crude oil from a separate Brent contract (hence the term 'book-out').[255] CFTC officials provided clarity to commenters by restating the

[251] As the CFTC was previously precluded from regulating swaps, these determinations concerning 'intent to deliver' pertained to the occasionally nebulous distinction between futures and forward contracts (see Chapter 6).
[252] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29828 (2011).
[253] Ibid.
[254] Again, at the time that the Brent Interpretation was made, the issue was whether Brent crude oil contracts could be regulated as futures agreements.
[255] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29828-9 (2011).

Commission's long-held opinion that the individual Brent contracts comprising a 'book-out' each created an obligation to deliver the underlying commodity – even though 'booking-out' the contract rendered its delivery obligation optional, thus retroactively and collectively swap-like – and that if such 'book-outs' satisfied the requirements of the 1990 Brent Interpretation and were effectuated as individual contracts, then these agreements "should" qualify for the forward contract exclusion.[256] Regarding the 1993 'Energy Exemption' (again, see Chapter 6), the CFTC proposed replacing it by extending the 'book-out' provisions of the Brent Interpretation to all nonfinancial commodities, not just crude oil. Through this proposal, the Commission would treat all OTC commodity derivative transactions involving qualifying 'book-outs' (i.e., those which convey a delivery obligation or involve commercial participants that "regularly make or take delivery") as unregulatable, excluded forward contracts.[257]

The second OTC commodity derivative-related aspect on which CFTC policymakers provided interpretive guidance was the case of forward contracts containing embedded options. Commenters requested that the Commission provide direction on this matter because the presence of an option within a forward contract meant, according to Dodd-Frank's 'swap' definition, that the derivative contract contained a swap, thus possibly preventing the whole instrument from qualifying for the forward contract exclusion and leaving it open to regulation as a swap.[258] In response, policymakers indicated that they would continue to apply the CFTC's traditional standard when determining if an OTC commodity forward contract with an embedded option could meet the criteria for exclusion from the 'swap' definition.[259] For this standard to be met, the option within the

[256] Ibid., at 29829.
[257] Ibid.
[258] Ibid., at 29829-30.
[259] Ibid., at 29830.

OTC commodity derivative contract (1) could adjust the contract's price, but "not undermine the overall nature of the contract as a forward contract," (2) must not "target the delivery term,[260] so that the predominant feature of the contract is actual delivery," and (3) cannot be "severed and marketed separately from the overall forward contract."[261] In codifying this 3-part test, CFTC policymakers noted that the Commission would look to the facts and circumstances of the transaction (or contract) when evaluating these three components and, therefore, the transaction's (or contract's) fitness for the forward contract exclusion.[262]

The proposed "Further Definitions" rule was adopted by the CFTC by a vote of 4 to 1 and was given a 60-day comment period. In support of the rule, Chairperson Gensler stated that the Commission's understanding of the forward contract exclusion for OTC commodity derivatives under the new Dodd-Frank regime was consistent with both what this law required for the regulation of swaps, and with how the agency had historically approached the exclusion of forward contracts from futures regulation.[263] While Commissioner Sommers voiced dissent, the commissioner's statement did not indicate disagreement with the CFTC's proposed interpretative guidance.[264]

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[260] While no definition of 'delivery term' is given in the proposed "Further Definitions" rule, the subsequently issued final "Further Definitions" rule clarified its meaning. In this latter release, the CFTC stated that 'delivery term' refers to the "delivery amount" (i.e., volume) of the transacted commodity; see Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48240 (2012). A narrow reading of this definition in the context of this 3-part test would imply that an option embedded within a forward contract which could adjust the amount of commodity for future purchase or sale (i.e., an embedded volumetric option) would render the overall agreement ineligible for the forward contract exclusion.
[261] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29830 (2011).
[262] Ibid.
[263] Ibid., at 29899.
[264] Ibid., at 29899-900.

An Analysis of the Forward Contract Exclusion of the Proposed "Further Definitions" Rule

To succinctly recap the foregoing, the forward contract exclusion of the proposed "Further Definitions" rule made the following regulatory updates: (1) a recontextualization to account for new swap regulations, which thereby continued excluding from regulation those OTC commodity derivative contracts for which physical settlement (i.e., delivery) was intended; (2) a recontextualization and expansion of the Brent Interpretation to cover 'book-outs' in all nonfinancial commodities; and (3) a codification of a three-part test focusing on a facts and circumstances methodology to judge whether a forward contract containing an embedded option or options qualified for the exclusion.

By using semiosis as a CPE analytical entry-point, several important insights into the semiotic influences on these three regulatory updates can be discerned. Starting with the first of the three items, the decision by CFTC policymakers to continue excluding from regulation certain OTC commodity derivative contracts intended to be physically settled corresponded directly to the Dodd-Frank Act's extension of the forward contract exclusion (see above and Chapter 7) and the agency's historical regulatory approach to such contracts (i.e., genuine forwards were excepted from regulation). Put simply, given the language of the overriding statute, Commission policymakers were obliged to continue excluding forward contracts from futures, and now swap, regulations.

Nevertheless, these policymakers' interpretation of this statutory provision for the forward contract exclusion was not only discursively informed by the language of the Dodd-Frank Act[265] and the Commission's regulatory precedent,[266] but was complemented by numerous comment letters to the "Definitions" advance notice. As cited by policymakers in

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[265] Recall that Dodd-Frank added the "intended to be physically settled" language as a requirement for an OTC commodity derivative contract to qualify for the forward contract exclusion.

[266] Prior to the Dodd-Frank Act – thus, prior to the regulation of swaps – these practices involved excluding forward OTC commodity derivates from regulation as futures contracts.

the text of the proposed "Further Definitions" rule – and as independently reviewed – these letters uniformly recommended that the CFTC interpret Dodd-Frank's language for swaps consistently with its existing exclusion of forwards from futures-style regulation (i.e., the exchange-traded requirement).[267] Thus, an intertextual (and interdiscursive) web involving the statute, prior precedent, and outside party comments can be said to have existed in the text of the "Further Definitions" rule, with these interlinked semiotic elements affirming the decision of Commission policymakers to recontextualize the existing forward contract exclusion to accommodate the new swaps regulatory regime.[268]

The presence of a similar intertextual (and interdiscursive) relationship is also apparent in CFTC policymakers' proposed application of the Brent Interpretation. Here, agency officials relied on the Dodd-Frank Act's "nonfinancial commodities" language, the legislative history and stated Congressional intent of the Act, the Commission's precedent of applying the Brent Interpretation to except certain physically-deliverable OTC commodity derivative contracts from future-style regulation, and outside party comments supporting the continued application of the Interpretation into the expanded swaps regulatory environment.[269] Furthermore, the proposed withdrawal of the 1993 'Energy Exemption' was cited by Commission policymakers as being the logical outgrowth of extending the scope of the Brent Interpretation to cover 'book-outs' in all nonfinancial commodities (e.g., electricity); which rendered the 'Energy Exemption' irrelevant.[270] From a semiotic

[267] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29828 (2011).
[268] Ibid: "Therefore, the CFTC reads the 'intended to be physically settled' language in the swap definition with respect to nonfinancial commodities to reflect a directive that intent to deliver a physical commodity be a part of the analysis of whether a given contract is a forward contract or a swap, just as it is a part of the CFTC's analysis of whether a given contract is a forward contract or a futures contract."
[269] Ibid., at 29828-9.
[270] Open Meeting on the Fourteenth Series of Proposed Rulemakings under the Dodd-Frank Act, 27 April 2011, Washington, D.C., at 39; transcript available at:

standpoint, this extension of the Brent Interpretation can be inferred as an offshoot of the decision to continue applying it, especially given Dodd-Frank's "nonfinancial commodities" language. Nevertheless, the discursive influence of commenters cannot be discounted as, in at least one comment letter, it was suggested that the Commission apply the Interpretation to 'book-outs' in all nonfinancial commodities rather than to only petroleum and its associated and derived substances (as were covered by the 1993 'Energy Exemption').[271]

Regarding the third and final update that CFTC policymakers made to the forward contract exclusion, the discursive origins of the statement on the Commission's proposed handling of forward contracts with embedded (commodity) options must be explored. In defining which of these derivative contracts could be excepted from regulation as a swap, the agency's policymakers drew on criteria located in a central textual source. As indicated in both the "Further Definitions" rule, and during the CFTC's meeting to vote on the rule, the proposed 3-part test and facts and circumstances methodology used to determine a contract's or transaction's regulatability were taken from a 2010 Commission opinion on a legal case involving options embedded in forward contracts.[272] Although outside parties provided comments to the CFTC on this matter,[273] and while this topic ostensibly arose in external meetings with prospective regulatees, in the proposed "Further Definitions" rule, agency policymakers expressed that this addition to the forward contract exclusion was a

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https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/dfsubmission/dfsubmissionmult_042711-trans.pdf.

[271] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29829 (2011); and see Letter from R. Michael Sweeney, Jr., David T. McIndoe, and Mark W. Menzes, Hunton & Williams, LLP on behalf of Working Group of Commercial Energy Firms, 20 September 2010, at 5-7. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26219&SearchText.

[272] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29830 (2011) and Open Meeting on the Fourteenth Series of Proposed Rulemakings under the Dodd-Frank Act, 27 April 2011, Washington, D.C., at 48.

[273] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29829 (2011).

codification of an existing Commission policy opinion,[274] and not the product of interested party input. To this point, changes to the CFTC's historic approach to forwards containing embedded options were advocated by industry-related commenters – such as the suggestion that the agency view any OTC commodity derivative contract with an enforceable delivery clause as an excluded forward[275] – but these did not translate into the text of the officials' proposal.[276]

What this analysis of semiosis shows is that in their crafting of the forward contract exclusion to the proposed "Further Definitions" rule, Commission policymakers primarily used the language of the Dodd-Frank Act and existing agency precedent to make sense of the rule-making's subject matter. As such, these sources were then utilized by agency officials to inform the content of the proposed forward contract exclusion. The discursive influence of comment letters from prospective regulatees and their representatives was, however, limited, and the content of these was only drawn on in a complementary capacity.

In keeping with the CPE theoretical framework, the above discussed semiotic factors interacted and co-evolved with their extra-semiotic counterparts to condition CFTC policymakers' selection of a regulatory approach and, thus, the construction of the proposed forward contract exclusion. The influence of the extra-semiotic, as was seen

[274] Open Meeting on the Fourteenth Series of Proposed Rulemakings under the Dodd-Frank Act, 27 April 2011, Washington, D.C., at 47-8.
[275] Letter from R. Michael Sweeney, Jr., David T. McIndoe, and Mark W. Menzes, Hunton & Williams, LLP on behalf of Working Group of Commercial Energy Firms, 20 September 2010, at 12. See also Letter from Matt Schatzman, BG Americas & Global LNG, 20 September 2010, at 9. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26165&SearchText.
[276] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29830 (2011).

earlier in connection with the “Commodity Options” proposal, can be uncovered by examining structuration through CPE’s four selectivities.

To begin with, from the standpoint of both the structural and discursive selectivities, the Dodd-Frank Act (including its legislative history) and the Commission’s existing policies on excepting from regulation certain OTC commodity derivative agreements provided, respectively, the bounds within which the agency could determine its regulatory course, and the discursive basis for informing and legally justifying the content of the proposed forward contract exclusion. Additionally, as it pertains to the structural selectivity, those considerations discussed in connection with the proposed “Commodity Options” rule are also valid in regards to the proposed exclusion’s rule-making. Namely, as the proposed “Further Definitions” rule was drafted within the context of a distinct rulemaking team, its progenitors may have been potentially limited in having a full appreciation for the complexity of the forward contract exclusion and how it interacted with other regulatory domains (i.e., commodity options), thus limiting the scope of this proposed interpretive guidance.

Regarding the agential selectivity, although the rulemaking team for the proposed “Further Definitions” rule seemingly enjoyed – as a distinct intra-agency entity – a degree of leeway in undertaking its rule-making task, Chairperson Gensler’s general influence over the regulatory approach to the forward contract exclusion can be assumed. Recall that, as addressed early in this chapter, Chair Gensler openly advocated that the CFTC implement regulations that brought qualifying OTC (commodity) derivatives into compliance with the Dodd-Frank Act. In the case of the proposed forward contract exclusion, its spirit contemplates requiring that essentially all OTC commodity derivative contracts containing optionality comply with Dodd-Frank’s transparency and systemic risk reduction regime – a regime both espoused by Gensler, and towards which policymakers were guided by the Dodd-Frank imaginary.

Finally, concerning technological selectivity, outside parties – such as industry participants, parties representing their interests, and non-industry advocacy groups – did provide comment letters to the CFTC on the topic of the proposed forward contract exclusion. The provision of such outside party perspective – not all of which came from prospective regulatees – helped to establish a reservoir of intellectual insight and resources from which agency policymakers could draw for their rule-making. Nevertheless, as noted above, these formally provided resources did not inform the content of the exclusion, but rather were used in a supportive or corroborative role as part of justifying the exclusion's proposal.

Similar to the earlier discussion of the Dodd-Frank imaginary in the relation to the proposed "Commodity Options" rule, through the proposed forward contract exclusion of the "Further Definitions" rule, Commission officials sought to bring under their regulatory umbrella of promoting transparency and mitigating systemic risk many OTC commodity derivatives transacting as forwards, whenever such derivatives contained (or presented) some degree of optionality (which could affect delivery obligations). Depending on the intended definition of 'delivery term', the proposed forward contract exclusion could have been interpreted as not excepting from Dodd-Frank swap regulations any OTC commodity derivative contract with an embedded option affecting the agreement's price or delivery amount. If this was indeed the CFTC's intent, as the definition of 'delivery term' in the subsequent rule suggested, then, congruent with the above case of commodity (trade) options, Dodd-Frank's transparency and risk reduction regime would be expansively applied to forward contracts with embedded optionality. This regulatory approach, guided by the

Dodd-Frank imaginary, was again influenced by the interaction and co-evolution of semiosis (the semiotic) and structuration (the extra-semiotic). As explored in this sub-section, this involved the predominance of the Dodd-Frank Act's language and agency precedent intersecting with a rulemaking team seeking to follow the Commission's (and their chairperson's) Dodd-Frank regulatory goals.

CONCLUDING REMARKS ON THE PROPOSED RULES

This chapter has presented the two proposed OTC commodity derivative rules which initially defined what qualified for regulation under the Dodd-Frank Act. It has analyzed the semiotic and extra-semiotic factors that influenced the rules' construction, and has explored the regulations' relation to the Dodd-Frank imaginary. The principal rulemaking-related takeaway from this undertaking is that Commission policymakers relied closely on the Dodd-Frank Act to inform and structure their proposed OTC commodity derivative regulations. While the solicitations by and speech acts of policymakers during the advance notice of proposed rulemaking period might have suggested that CFTC officials would be inclined to codify rules which reflected the perspectives of outside party commenters – particularly those provided by industry-related interests – given the presumed complexity of the rule-makings, this analysis suggests that the proposed "Commodity Options" rule and forward contract exclusion were overwhelmingly an outgrowth of an abidance to the overriding statute and, in the case of the exclusionary proposal, the recontextualization and continuation of agency precedent as well.

Therefore, it can be stated that for the two proposed OTC commodity derivative rules, Commission policymakers were not beholden to the thoughts and representations of prospective regulatees and their representatives when these officials selected and constructed their proposed regulatory approaches to commodity and trade options as well as to the forward contract exclusion. Rather, other semiotic and extra-semiotic factors – such as the language of the Dodd-Frank Act and its understood intent in the context of Chairperson Gensler's regulatory vision for OTC derivatives – were key influences. This should not come as a surprise, however, as Gensler intimated at several Congressional hearings in 2011 that the first "guiding principle" of the agency's proposed rulemaking efforts was "the statute itself," with which he directed policymakers to "fully comply" in order to "lower risk and bring transparency" to OTC derivative markets.[277] Largely because of this close adherence to the text of the Act – and its equation of options and swaps, in particular – the proposed regulations for OTC commodity derivative would be the most stringent that Commission policymakers would craft over the course of the six-year rulemaking period.

Viewing the findings of the above analysis from the broader perspective imparted by this paper's CPE theoretical framework provides further insight into the two rule-makings and the "black box" (West 2009) out of which these proposals arose. For instance, by approaching the drafting of the OTC commodity derivative regulations as a process involving inherent complexity reduction, it can be posited that the policymakers creating these two rules simplified their task by engaging in semiosis and structuration under the guidance of a Dodd-Frank imaginary which geared their efforts towards increasing transparency and mitigating systemic risk. As the results of the analysis suggest, this was accomplished through the utilization by Commission officials of the language of the Dodd-

[277] See, for instance, Testimony of Chairman Gary Gensler before the House Committee on Agriculture, 10 February 2011. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68; Testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Chairman Gary Gensler, 17 February 2011. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-70 ; and Testimony of Chairman Gary Gensler before the Senate Committee on Banking, Housing, and Urban Affairs, 12 April 2011. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-77.

Frank Act and, occasionally, existing agency regulations (semiosis), in addition to the compossible structural opportunities and constraints for/on new regulatory development afforded by the interfacing of the Act and prior regulations in the context of distinct rulemaking groups – with or without adequately provided external intellectual resources – that sought to adhere to the regulatory vision espoused by the CFTC's chairperson (structuration). More simply, relying extensively on Dodd-Frank's language and, in some cases, past agency policies and practices was an effective way for CFTC policymakers to craft proposed OTC commodity derivative regulations, given the bounds conveyed by these laws and the milieu of the agency's rulemaking effort. In the words of one former high-level Commission interviewee:

> Well, regulators like a lot of people in government are creatures of habit and they're not particularly innovative thinkers, and so they look at existing structures. You'll find that government and laws are dotted with redundancy throughout history. So, in this case like many other cases, we looked at our existing regulations and tried to say, 'How do we fit in OTC into the existing regulations?' And this is what regulators do. It's what people in government do. And it's the only guidepost that you have, so, rather than create things out of whole cloth, you go back to the same workshop. And it actually turned out that it was a good way to go in many instances with regard to OTC regulations. But it wasn't ultimately a perfect fit for a lot of what we were doing (Interview, 9 October 2017, Washington, D.C.).

Yet, as will be explored in the next chapter, the regulatory structures that were proposed (i.e., selected) in the "Commodity Options" and the forward contract exclusion of the "Further Definitions" rule would be viewed as unworkable to many OTC commodity derivative marketplace participants. Especially was that so with regard to commercial end-users (e.g., electricity providers and oil pipeline companies), and would be contested (i.e., subject to variation in the terminology of CPE) by such entities through the formal provision of comment letters and through other informal forms of lobbying. The effect would be a redefinition of which OTC commodity derivatives the CFTC would determine to regulate under Dodd-Frank. Flowing from this, the Dodd-Frank imaginary which guided Commission policymakers towards promoting transparency surrounding and mitigating systemic risk associated with OTC derivatives would be refined to account for this modified definition – one which provided some exclusionary and exemptive regulatory relief for certain OTC commodity derivative marketplace participants.

Chapter 9 – The Final Rules for OTC Commodity Derivatives (2011-2012)

INTRODUCTORY REMARKS

After promulgating the proposed "Commodity Options" and "Further Definitions" rules and the elapse of their respective comment periods, the CFTC published the final versions of these rules. On April 27, 2012, the Commission issued the "Commodity Options" ("Commodity Options") final rule,[278] and, jointly with the SEC, on August 13, 2012, the CFTC released the final "Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" ("Further Definitions") rule. These rules, respectively, provided regulations for commodity and trade options and defined the term 'swap' while setting forth a formal exclusion from this definition for certain OTC forward commodity contracts. The production of the final rules emerged from a broader environment similar to that discussed in Chapter 8. Chairperson Gary Gensler remained at the Commission's helm and was supported by the same cast of commissioners as during the preceding rulemaking period; the agency faced budgetary constraints (particularly relative to its Dodd-Frank rulemaking and oversight tasks)[279]; and the prospect of a general election and a new president from a different political party continued to loom.

This chapter analyzes OTC commodity derivative final rulemaking and explores how these final regulations were constructed by CFTC policymakers. The upcoming analyses of the regulations for commodity (trade) options, and of the forward contract exclusion, which utilize the analytical lenses provided by the CPE theoretical framework, show that outside

[278] Note that for the first time in its Dodd-Frank era rulemaking history, the regulation of commodity options was separate from agricultural swaps and took the form of a standalone rule.
[279] See Chairman's Letter, President's Budget and Performance Plan for Fiscal Year 2013, Chairman Gensler, 13 February 2012. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement021312a.

party comment letters received by the Commission served as the primary impetus for modifications made thereto during final rulemaking. Emerging from the intersection of the discourses advanced in these comment letters, the overarching Dodd-Frank Act, and several extra-semiotic factors (including the involvement and influence of CFTC Chair Gensler), alterations were made to the rule for commodity options to allow for a new trade option exemption, and were made to the forward contract exclusion to except, in limited instances, some OTC commodity derivative forward transactions containing volumetric optionality from swap regulations. Other elements of the earlier proposed “Commodity Options” and “Further Definitions” rules were, however, retained and finalized. While prospective regulatees were able to exert some influence over the production of OTC commodity derivative final rulemaking, CFTC officials continued to be guided by the Dodd-Frank imaginary which directed their regulatory efforts towards bringing transparency to and reducing the systemic risk of OTC derivatives; albeit an imaginary refined in response to changes to its semiotic and extra-semiotic supports.

The structure of the instant chapter is as follows. To begin, the content of the final “Commodity Options” rule is reviewed and is followed by an analysis thereof. This exploration focuses on the retention of the regulatory position to treat commodity (trade) options as swaps, and on the granting of a new trade option exemption. Then, the forward contract exclusion of the final “Further Definitions” rule is presented and analyzed. This analysis consists of inquiring into the ‘intent to deliver’ standard at the heart of the rule’s forward contract exclusion, and assessing the exception’s inclusion of a 7-part test for forward contracts with embedded volumetric optionality.

THE FINAL RULES AND THEIR ANALYSES

The Commodity Options Final Rule and its Interim Final Rule for Trade Options

Written by the CFTC's Agricultural Swaps Rulemaking Team,[280] the final rule regulating commodity options effectively formalized two things. First, the "Commodity Options" rule adopted nearly all non-trade option related elements of its proposed form into a new Part 32 regulation.[281] As stated in the previous chapter, notwithstanding matters pertaining to trade options, the principal thrust of the proposed "Commodity Options" rule was to convey that the Commission intended to treat qualifying commodity options[282] in the same manner as it would swaps.

The final "Commodity Options" rule codified this view into law by formally permitting the transaction of commodity options subject to "the same rules applicable to any other swap."[283] This had the stated effect of providing "increased regulatory certainty to market participants transacting commodity options" by ensuring the legality of such transactions.[284] Moreover, it meant that unless a commodity option qualified for either an exclusion (i.e., the forward contract exclusion) or an exemption (i.e., the trade option exemption), the post-trading regulatory infrastructure for swaps – i.e., reporting and recordkeeping requirements, margining, clearing, and position limits (see Chapter 1 and Glossary) – would be applied to the contract. Such application possibly resulting in increased compliance costs for the firm trading the regulated contract. In the case of non-financial entities not partaking in other forms of swap trading, such as some commercial

[280] Commodity Options, 77 Fed. Reg. 25320 (2012).
[281] Ibid., at 25321 and 25325f.
[282] The commodity option contracts that would qualify for the same regulations as swaps are those that met the 'swap' definition within the Dodd-Frank Act and as further defined in the final "Further Definitions" rule. See Commodity Options, 77 Fed. Reg. 25321 at footnote 6 (2012).
[283] Commodity Options, 77 Fed. Reg. 25325 (2012).
[284] Ibid.

participants (e.g., a small commodity merchant transporting gold) and end-users (e.g., a natural gas-fired electrical power plant), these costs could be significant, as the firms may not otherwise have a compliance structure for Dodd-Frank swap regulations in-place.

Second, the final "Commodity Options" rule put forth a new trade option exemption – subsumed as an interim final rule – which would be available to qualifying OTC contracts in all nonfinancial commodities with the exception of 'enumerated' agricultural products and which would have actual exemptive power from some Dodd-Frank swap regulations.[285] This interim final rule deleted the CFTC's existing trade option exemption and replaced it.[286] The term 'interim' did not, however, impact enforceability or compliance, but rather denoted that this new regulation would be subject to a 60-day comment period and potential subsequent amendment.[287]

To understand the possible perceived need for a new trade option exemption, it is worth briefly revisiting the previously proposed modifications to the exemption. As noted in the Chapter 8, the proposed "Commodity Options" rule simply gave approval to the continued transacting of trade options, so long as the transactions' parties were 'eligible contract participants', as that term is defined by law. Nevertheless, given the proposed rule's treatment of commodity (trade) options as swaps, the proposed trade option exemption did not exempt trade options from being subjected to the post-trading

[285] The term 'nonfinancial commodity' is interpreted in the forward contract exclusion of the final "Further Definitions" rule. Broadly, it is defined as physically deliverable Exempt Commodities (i.e., energy and metals), non-enumerated agricultural commodities (e.g., coffee, sugar, cocoa, dairy, and lumber), or nonfinancial intangible commodities to which ownership can be conveyed and the commodity consumed (e.g., emission allowances); see Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48232f (2012). Although not included in the term 'nonfinancial commodity', 'enumerated' commodities include wheat, cotton, and livestock, among others, and are defined by the CFTC's Agricultural Commodity definitional rule; see Agricultural Commodity Definition, 76 Fed. Reg. 41048 (2011). As utilized in this study, 'nonfinancial commodity' will refer to energy and metal commodities, and is treated as synonymous with OTC commodity derivative.
[286] Commodity Options, 77 Fed. Reg. 25321 (2012).
[287] Ibid., at 25320.

regulatory infrastructure (see above) for swaps (i.e., Dodd-Frank swap regulations). Thus, the proposed “Commodity Options” rule’s trade option exemption extended only to allowing trade options to be transacted while leaving them subject to the same intensive regulatory treatment as swaps.

For instance, this meant that an over-the-counter derivative agreement wherein an eligible party had the option to purchase 10,000 tons of copper, to be delivered on a certain future date at a specified (or even variable) price, would qualify as a swap under Dodd-Frank. For commercial marketplace participants (e.g., copper mining companies) and end-users (e.g., electrical equipment manufacturers) of OTC commodity derivatives, such as physically settled commodity (trade) options, this proved to be a point of contention because of these entities’ routine use of such derivative contracts in their ordinary business operation (e.g., a wind energy company contracting to sell a residual amount of unforecastable, variable wind-produced electricity). As will be discussed in the next sub-section, through the provision of comment letters to Commission policymakers, commodity industry interests expressed their discontent regarding the lack of exemptive relief and lobbied the agency for the adoption of a new trade option exemption. These comment letters were, in accordance with the Administrative Procedure Act’s requirements (see Chapter 2), reviewed and responded to by CFTC officials. Thus, in the vocabulary of CPE, the rulemaking process for commodity (trade) options reverted to a stage of variation, as interested party comment letters contested the regulatory approach towards these instruments selected in the proposed rule version, and, then, provided the formal basis for policymakers to imagine alternative treatments of trade options (i.e., the selection of another approach stemming from, in part, a review of the letters received).

The treatment that was selected in the new (interim) trade option exemption of the final "Commodity Options" rule stipulated that a commodity option transaction would be exempt from many aspects of Dodd-Frank's post-trading infrastructure if it met three criteria (thus, rendering the transaction an exempt trade option). First, the offeror (grantor or seller) of the commodity option would have to be an 'eligible contract participant' or a "producer, processor, or commercial user of, or a merchant handling the commodity which is subject to the commodity option transaction, or the products or by-products thereof, and be offering or entering into the transaction solely for the purposes related to its business as such."[288] Notwithstanding the seeming complexity of the 'eligible contract participant' qualification, two straightforward examples of satisfying this criterion would be: (1) a copper mining company entering into an over-the-counter commodity option contract for the delivery (sale) of copper to a copper wire manufacturer and (2) a petroleum pipeline (transportation) business agreeing over-the-counter to a commodity option contract for the delivery (sale) of ethane transported on its pipeline network to a refinery.

The second criterion was that the offeree (grantee or buyer) of the commodity option would have to be a "producer, processor, or commercial user of, or a merchant handling the commodity which is subject to the commodity option transaction, or the products or by-products thereof, and be entering into the transaction solely for the purposes related to its business as such."[289] Similar to the above illustrations involving sellers of a commodity, a simple example of achieving this second criterion would be a local utility co-op purchasing, through a commodity option contract with another party, electricity generated at a nearby hydroelectric dam. (Note that the interim final trade option exemption deleted the requirement that both the offeror and offeree be a 'eligible

[288] Ibid., at 25326.
[289] Ibid.

contract participant'; this deletion allowed smaller commodity businesses access to the exemption.)

The third criterion declared essential was that both parties to the agreement must intend that the commodity option be physically settled.[290] Specifically, if the optional commitment within the contract was exercised – thus, obligating its performance – this exercise would have to result in the sale of the nonfinancial commodity for "immediate (spot) or deferred (forward) shipment or delivery."[291]

An example of a transaction meeting all three criteria, thus qualifying for the trade option exemption, is an OTC agreement that granted an oil terminal company, as a buyer, the option to purchase from a seller's pipeline an additional 100,000 barrels of light sweet crude oil per month for actual delivery into the buyer's tank farm. Conversely, an OTC agreement between commercial participants for the optional sale of 1,000,000 gallons of gasoline wherein delivery is not intended – and the contract is, thus, intended to be cash settled – would not qualify for the trade option exemption. Instead, it would remain a commodity option subject to applicable regulation as a swap. Moreover, if the buyer of an OTC option on gasoline was a pension fund with no commercial use for the commodity, the transaction would likewise be prevented from being exempted.

Although OTC commodity derivatives which qualified for the trade option exemption would be exempt from the bulk of Dodd-Frank swap regulations, certain regulatory conditions were placed on these instruments. Chief among these were recordkeeping and reporting requirements.[292] Reviewing these is important because they

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[290] Ibid.
[291] Ibid.
[292] Ibid., at 25327f. Other conditions by which exempted trade options had to abide included antifraud and anti-manipulation provisions, anti-evasion language for swap dealers and major swap participants attempting to pass swap activity off in the form of less regulated trade options, and

illustrate Commission policymakers' commitment to applying the Dodd-Frank imaginary's notion of promoting transparency to exempted trade options.

Concerning recordkeeping, trade option activity would have to be recorded by each party to the transaction. These records would have to comply with the CFTC's Part 45 swaps recordkeeping and reporting regulation.[293] Briefly, this meant that trade option recordkeeping requirements for entities not having significant positions in swaps were less stringent than for their more regulated swap dealer and major swap participant counterparts.[294]

Also required was that trade option data and information be reported to the CFTC (sometimes through an electronic database known as a 'swap data repository').[295] The exemption held that if a party to the trade option had in the preceding twelve months been required to report a (non-trade option) swap to the Commission, then the trade option would have to be reported by one of the transaction's counterparties in real-time.[296] For those trade options where neither counterparty reported (non-trade option) swaps over the prior twelve months (trades often between commercial commodity end-users), the agency required these transactions be documented and reported by each party on a standardized yearly filing known as Form TO.[297] This form was novel in that the agency had never previously had a reporting structure for OTC commodity (trade) options, whereas it

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including trade option positions in assessments of entity compliance with the CFTC's existing large trader reporting scheme. Also, through the final provision of the trade option exemption, the Commission retained general exemptive authority to grant regulatory relief to commodity (trade) option transactions.

[293] Commodity Options, 77 Fed. Reg. 25327 (2012).

[294] Ibid.

[295] Ibid.

[296] See, ibid., for the procedure to determine the reporting party.

[297] Commodity Options, 77 Fed. Reg. 25327 (2012).

had for agricultural trade options (see Chapter 7).[298] On the form, parties to qualifying trade options were required to state the aggregate value of all exercised (not executed) trade options[299] in nonfinancial commodities agreed to in a calendar year.[300]

The final "Commodity Options" rule was unanimously approved by the CFTC's chairperson and four commissioners.[301] In his terse voting statement, Chairperson Gensler voiced support for treating commodity options as swaps, as the Dodd-Frank Act directed, and for the less stringent regulatory structure put in place for those commodity options qualifying for the new trade option exemption.[302] Nevertheless, the chairperson acknowledged that further outside party comment on this interim final exemption rule would be forthcoming.[303]

An Analysis of the Commodity Options Final Rule and its Interim Final Rule for Trade Options

The CPE-informed analysis of the construction of the final "Commodity Options" rule begins with the first regulation that the rule formalized – treating commodity options as swaps. As stated above, the retention of this treatment by the Commission mirrored the approach

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[298] The Form TO system resembled the reporting process for the Commission's defunct 'Agricultural Trade Option Merchant' scheme discussed earlier in this thesis. Given that the Agricultural Swaps Rulemaking Team crafted Form TO and that the team had rulemaking experience with the terminated 'Merchant' program (as mentioned in Chapter 7), it is possible that Form TO, and the exempted trade option information that it sought to capture, was modelled after the disused scheme's reporting guidelines. For 'Agricultural Trade Option Merchants', reporting had to be done quarterly and have to include information covering the commodity being traded and the trader's position in that commodity. For a copy of this filing's requirements, see: https://www.cftc.gov/sites/default/files/opa/press99/opa4251-99-attch1.htm.

[299] For instance, a commodity option may be executed (entered into) in 2013, but its optional component not exercised until 2014. The value of the optional portion of the contract would only be disclosed, in aggregate, on Form TO when it was exercised.

[300] Commodity Options, 77 Fed. Reg. 25327f (2012).

[301] Ibid., at 25344.

[302] Ibid.

[303] Ibid.

that the agency had put forth in the rule's proposed form. Thus, from the proposed to the final stage of rulemaking, no changes occurred to this regulation.

Nevertheless, the CFTC's position of classifying commodity (trade) options as swaps was challenged in comments to the proposed "Commodity Options" rule. Some commenters – such as those from the electricity generation sector – requested that the Commission delay the promulgation of its interpretation that commodity options were, in the first sense, swaps, at least until the term 'swap' had been defined in the final "Further Definitions" rule.[304] Others argued that all commodity option transactions – by virtue of being options on deliverable commodities – unambiguously intended physical settlement and, therefore, could not be swaps as defined in the Dodd-Frank Act.[305] It should be noted that these comments were produced by an array of commodity industry interests, including individual firms involved with various commodities and commodity-related ventures and industry trade groups representing amalgamations of swap dealers and end-users in a variety of commodities and related activities.[306] Furthermore, there existed no consensus concerning the treatment of commodity options across the comment letters received by the CFTC. Some commercial firms and industry groups posited the equivalence of commodity options and swaps (e.g., the Working Group of Commercial Energy Firms), while others did not (e.g., Gavilon – an integrated agricultural and energy commodity company –

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[304] See Letter from Joseph Kelliher, NextEra Energy Resources, 11 March 2011; Letter from Catherine Krupka on behalf of Edison Electric Institute and Electric Power Supply Association, 4 April 2011; and Letter from Russell D. Wasson on behalf of National Rural Electric Cooperative Association, American Public Power Association, and
Large Public Power Council, 4 April 2011. Each available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1196. Also, see Commodity Options, 77 Fed. Reg. 25323 (2012).

[305] See Letter from David Perlman, Bracewell & Giuliani on behalf of Coalition of Physical Energy Companies (COPE), 4 April 2011 and Letter from Lance Kotschwar, Gavilon Group, LLC, 4 April 2011. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1196. Also, see Commodity Options, 77 Fed. Reg. 25323 (2012).

[306] Commodity Options, 77 Fed. Reg. 25322f (2012).

and the Coalition of Physical Energy Companies).[307] Thus, the only common thread on this matter across the comment letters was that the arguments advanced by commenters reflected their own interpretations of the Dodd-Frank Act's equivalence of (commodity and trade) options and swaps.

Commission policymakers' retention of characterizing these options as swaps, irrespective of the arguments of some commenters, was significantly influenced by their conception of the Dodd-Frank Act. As indicated in Chapter 8, CFTC officials had, in the proposed stage of OTC commodity derivative rulemaking, perceived that the Act intended for options to be analogous with regulatable swaps. This remained the prevailing interpretation of agency officials in the final rule release; thereby sedimenting the regulatory equivalence of (commodity and trade) options and swaps.[308]

Given that the language of Dodd-Frank states, with one explicit exception for options on SEC-regulatable financial instruments, that options of any kind are swaps,[309] it can be posited that this overarching statute provided both semiotic and extra-semiotic support to the CFTC's regulatory position despite challenges by some outside parties. From a semiotic standpoint, Dodd-Frank's language directly informed the Commission's approach as codified in the proposed and final "Commodity Options" rules (i.e., an intertextual and interdiscursive relationship as the rules drew on the text of the Act), and in regards to the extra-semiotic, Dodd-Frank statutorily bound the agency to treat (commodity and trade) options as swaps (i.e., structuration as an enforced selection of this approach). To the latter point, this enforced selection can be seen as the product of the interplay between the structural and discursive selectivities in that Dodd-Frank empowered CFTC policymakers

[307] Ibid., at 25323.
[308] Ibid., at 25325f.
[309] Commodity Exchange Act § 4, 7 U.S.C. § 1a(47)(B) (2010).

with the legal authority to rule-make, while simultaneously providing the statutory discursive basis to treat options and swaps congruently.

Although the formal adoption of this approach meant that, in this first sense, commodity (trade) options were swaps, it had the concomitant effect of sanctioning these derivative instruments and, thereby, allowing the CFTC exemptive authority over them (as swaps on commodities fell within the agency's regulatory jurisdiction). The Commission exercised this authority through its creation of a new trade option exemption from most swap regulations for qualifying OTC commodity derivatives. A trio of aspects related to the trade option exemption found in the final "Commodity Options" rule must be analyzed to wholly understand how policymakers constructed this part of the final rule. Those aspects include: (1) agency officials' decision to grant an exemption, (2) the assembly of the exemption's three specific qualifying criteria (a matter about which some thoughts already have been proffered), and (3) the application of recordkeeping and reporting requirements to exempted trade options.

The decision to grant a trade option exemption was fully at the CFTC's discretion. There was no statutory obligation to do so, with agency policymakers acknowledging as much: "…a plain reading of section 721 of the Dodd-Frank Act makes clear that all commodity options are swaps, without any special treatment of trade options."[310] Nevertheless, as stated in the preceding sub-section of this thesis, Commission officials' receipt and review of outside party comment letters to the proposed "Commodity Options" rule – many of which were submitted by commodity (trade) option commercial marketplace participants, end-users, or groups representing such entities' interests – provided an impetus for the reimagining of the trade option exemption.

[310] Commodity Options, 77 Fed. Reg. 25332 (2012).

Since the trade option exemption of the proposed "Commodity Options" rule would not have prevented commodity (trade) options from being regulated as swaps, a variety of potential costs loomed large, especially for those firms not otherwise engaged in regulatable swap activities – often commercial marketplace participants and end-users. Stemming from the perceived threats posed by such regulatory costs, prospective regulatees communicated extensively with Commission officials following the publication of the proposed rule. The main aim of their efforts was to lobby the CFTC for a truly effective trade option exemption to be included in the final "Commodity Options" rule; an exemption which would preclude trade options from having to comply with the potentially costly post-trade infrastructure of Dodd-Frank.

Communications between interested parties and agency policymakers took place formally through the submission of comment letters and informally in external meetings. In total, the Commission received 21 comment letters from a range of outside parties, including from the Hess Corporation (an energy company), the Edison Electric Institute and Electric Power Supply Association (an electricity trade association), the Financial Services Roundtable and ISDA (financial industry lobbying groups), and the American Petroleum Institute and the American Gas Association (energy industry trade groups), to name a few.[311] Notably absent from the comment file to the proposed "Commodity Options" rule were letters by public interest groups and other entities and individuals advocating non-industry perspectives.[312] CFTC officials also held numerous external meetings with industry actors and their representative organizations.[313] As mentioned later in this sub-section,

[311] Ibid., at 25323.
[312] See the comment file at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=968.
[313] For a database of the external meetings taking place between the proposed and final rule issuances, see: https://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings.

electricity companies and their related trade associations were prominent attendees of these meetings.

The formal and informal lobbying efforts by such OTC commodity derivative market participants were successful in that the exemptive decision made by agency policymakers was prompted by such participants' communications: "Upon consideration of the comments to the [proposed "Commodity Options" rule], the Commission […] is adopting an interim final rule that incorporates an exemption for 'trade options'." [314] In doing so, CFTC officials determined that issuing a new trade option exemption was in the public's interest – a determination that, as discussed in Chapter 6, was required for a regulatory exemption to be granted. The agency's stated justifications for this were that a trade option exemption provided "effective and efficient risk management tools to commercial market participants" – i.e., through their use of commodity (trade) options for presumably non-speculative commercial purposes – and that the Commission's historical regulatory experience proved the "utility of a trade option exemption for physical delivery of options used by commercial parties."[315]

Broadly, the CFTC's adoption of a new trade option exemption indicates that prospective regulatees successfully managed to exert their instrumental power (i.e., lobby) in formal and informal settings to attain a desired regulatory outcome. To analyze this achievement from a CPE perspective, the semiotic and extra-semiotic influences that conditioned policymakers' regulatory construction in favor of these parties' requests for an exemption merit examination.

[314] Commodity Options, 77 Fed. Reg. 25331 (2012).
[315] Ibid., at 25334.

Starting with the semiotic, two central arguments for a trade option exemption were advanced by commenters. These arguments were considered by agency officials in their decision-making and, as cited in the final "Commodity Options" rule's text, were as follows: (1) having an exemption for physically settled commodity options better provides a multitude of users with essential tools to manage commercial risks and, (2) the Dodd-Frank Act did not intend for physically (as opposed to financially) settled OTC commodity options to be treated as swaps.[316] (Although many industry commenters asserted that they, or the firms that they represented, would incur significant costs should a trade option exemption not be issued,[317] this argument was not considered by policymakers in their exemptive determination because, as these officials stated, the argument was only supported anecdotally and was not accompanied by quantitative evidence of such costs.[318])

In justifying the granting of the new exemption, CFTC officials explicitly agreed with the first argument. As stated by agency policymakers in the final "Commodity Options" rule: "The trade option exemption provides an important hedging and risk management tool for commercial market participants."[319] This denotes an intertextual and interdiscursive relationship between the final rule and the comment letters. The significance of this relationship is that it implies Commission policymakers adopted and relied on the representations of interested party commenters as to the nature and function of commodity (trade) options as risk management tools (for commercial hedging purposes as opposed to being used for speculation; see Chapter 1). An inference that can be drawn from this is that, beginning with this particular rulemaking juncture, CFTC officials evidently

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[316] Ibid., at 25324 and 25330f.
[317] Ibid., at 25323f.
[318] Nevertheless, from these accounts, CFTC policymakers did conclude that commercial users placed "great importance" on maintaining a trade option exemption; see Commodity Options, 77 Fed. Reg. 25331 (2012).
[319] Commodity Options, 77 Fed. Reg. 25333 (2012).

differentiated between those risks associated with commercial commodity market activity, wherein delivery of the (optional) commodity is intended, and those activities of non-commercial, financial actors who typically financially settle their OTC derivatives.

Although the Commission's position on the equivalence of commodity (trade) options and swaps precluded CFTC officials' from accepting the second argument – due to this approach preventing a compossible combination with this commenter argument – agency policymakers did, however, accede to commenters' view that physical settlement (delivery) of commodity (trade) options necessitated a different regulatory structure than for those financially settled swaps. As these Commission officials stated: "…the Commission could have elected to make the exemption available to trade options that, if exercised, result in either physical or financial settlement […] commenters [, however,] focused on the need for a trade option exemption specifically for physically delivered options. The Commission did not receive similar comments regarding financially settled transactions."[320]

To understand these arguments' influence on CFTC policymakers' decision to issue a new trade option exemption, they must be considered alongside the extra-semiotic variables with which they interacted and co-evolved. This can be accomplished by analyzing CPE-posited structuration through the four selectivities: technological, discursive, agential, and structural. From the standpoint of the technological selectivity, OTC commodity derivative industry interests were able to submit comment letters to the CFTC through the formal rulemaking process; thus, providing the agency's policymakers with a pool of intellectual resources relating to industry's experience with commodity (trade) options. Moreover, these resources were ostensibly supplemented during the informal exchanges between prospective regulatees and Commission officials at external meetings. As alluded

[320] Ibid.

to above, these parties achieved hegemony over the formally supplied intellectual resources (i.e., comment letters), as no non-industry entities participated in the comment period.

Regarding the discursive selectivity, commenters on the proposed “Commodity Options” rule essentially unanimously requested a trade option exemption.[321] This meant that numerous commodity industry participants supported an exemption, and that there was virtually no formally supplied countervailing data, information, or perspective on the matter for CFTC policymakers to evaluate during their final rule-making. Simply put, a singular line of commentary was ubiquitously expressed in the discourses of the comment letters received by the Commission: reinstate a trade option exemption. Another component of this selectivity is that the language Dodd-Frank Act and the agency’s stated equivalence of commodity (trade) options and swaps promoted a discourse which preempted the other request of commenters from being accepted – that physically settled options not be considered swaps. (This can also be seen in the same manner through the structural selectivity, as these same statutory and regulatory edicts bound CFTC policymakers in a manner which prevented them from agreeing with any conflicting request.)

In relation to the agential selectivity, the Chairperson of the Commission, Gary Gensler, was involved in numerous external meetings relating to the regulation of commodity (trade) options with prospective regulatees, in particular, electricity suppliers and their trade associations.[322] Involving the Chair in these meetings meant that interested

[321] Ibid., at 25324. See also, Open Meeting to Consider Two Final Rules, 12 April 2012, Washington, D.C., at 39. Transcript available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission2_041812-trans.pdf.

[322] Open Meeting to Consider Two Final Rules, 12 April 2012, Washington, D.C., at 51f.

parties had direct access to, arguably, the most influential policymaker at the agency when they discussed their position on exempting physically settled commodity options, or trade options. Thus, the potential existed for such parties to exploit this powerful relationship to their advantage, and thereby affect the content of any relevant rule. In fact, Gensler was in agreement with position expressed by prospective regulatees on the matter of re-issuing the trade option exemption.[323] This is evidenced both by his vote in favor of the final "Commodity Options" rule and in his speech acts during the meeting in which this rule was voted on.[324] Nevertheless, during this same meeting, the Chairperson restated his view that commodity options were – under the Dodd-Frank Act – regulatable swaps in the first sense.[325] As such, in his opinion, trade options (as a form of commodity options) would still have to be subject to Dodd-Frank's transparency (i.e., recordkeeping and reporting) requirements.[326]

Lastly, as it concerns the structural selectivity, it is worth considering the intersection of the semiotic (in the form of the commenters' arguments) and the intra-agency structure (see Chapter 8) of the CFTC's OTC commodity derivatives rulemaking effort. As evidenced by the remarks of key members of the Agricultural Swaps Rulemaking Team responsible for drafting the final "Commodity Options" rule, while this rule was being finalized, there existed extensive coordination between its team members and individuals involved in drafting the final "Further Definitions" rule – usually attorneys from the Commission's Office of General Counsel privy to the separate rule-makings.[327] This is

[323] Ibid., at 13f: "We received a lot of feedback from commercial market participants that commodity options used by commercial entities to deliver and receive physical commodities in connection with their business don't need the same level of oversight as swaps. I will say that I agree with that."
[324] See Commodity Options, 77 Fed. Reg. 25344 (2012) and Open Meeting to Consider Two Final Rules, 12 April 2012, Washington, D.C., at 13f.
[325] Open Meeting to Consider Two Final Rules, 12 April 2012, Washington, D.C., at 13.
[326] Ibid., at 14.
[327] Ibid., at 50f.

significant because it afforded a structural opportunity for differing conceptions of the regulatory intent of the Dodd-Frank Act to be exchanged from one rulemaking area to the next. The conception which flowed from the work done on the final "Further Definitions" rule (see below) – the forward contract exclusion, to be specific – was that Dodd-Frank did not intend to subject to regulation as swaps OTC transactions in nonfinancial commodities between commercial market participants, wherein the intended result of the transaction was the commodity's delivery (i.e., physical settlement).[328] Given the Agricultural Swaps Rulemaking Team's consideration of this modified notion of a regulatable OTC commodity derivative, it can be posited that prospective regulatee arguments advancing a similar understanding of commodity (trade) options could be palatable to their regulator; thus, aiding these parties' exemptive cause.

One final item to consider is that, as described in Chapter 8, the Commission had historically provided a trade option exemption. This past exemption permitted commercial parties to transact commodity options without regulatory oversight. As previously explained, through the proposed "Commodity Options" rule, the CFTC sought, in certain circumstances, to continue allowing such transactions, but would subject them to the gamut of Dodd-Frank swap regulations (i.e., reporting, recordkeeping, clearing, margining, and position limits). This proposal marked a significant deviation from historical agency precedent. Nevertheless, in the final "Commodity Options" rule, Commission policymakers acknowledged that they had traditionally provided a trade option exemption and that granting a new one – as encouraged in comment letters by interested parties – was

[328] See, ibid. at 49-51, for a recitation of how the Agricultural Swaps Rulemaking Team perceived the interplay between their final regulations for commodity options and the soon-to-be finalized definition of a 'swap'.

consistent with its past regulatory approach and would not represent an unprecedented exercise of the agency's exemptive authority.[329]

This analysis of the decision by CFTC officials to grant a new trade option exemption evidences a reimagining of how these policymakers sought to regulate commodity (trade) options from the proposed to final rulemaking stage. The ultimate regulatory approach expressed in the final "Commodity Options" rule was that a commodity option transaction would be exempt from most of the Dodd-Frank Act's regulatory regime – i.e., given an exemption as a trade option – if the contract was between an 'eligible contract participant' or a commercial party (as offeror) and another commercial enterprise (as offeree) and the optional commitment in the agreement, if exercised, would be physically settled (i.e., delivery of the commodity asset referent). As shown above, the selection of this regulatory approach was influenced by interacting and co-evolving semiotic and extra-semiotic factors. Specifically, through formally submitted comment letters, outside party commenters – comprising only commodity industry affiliates – argued for the reinstatement of a genuine trade option exemption. Moreover, these arguments were, presumably, conveyed in informal meetings with influential Commission policymakers (who were open to such contentions) and were expressed in an institutional milieu in which cross-pollination of perspectives between rulemaking teams concerning the nature of a regulatable OTC commodity derivative was, arguably, occurring, and, further, a milieu that included historical agency precedent in which a trade option exemption had been accepted. The ultimate effect was one where the discourses advanced by prospective regulatees found an agency whose policymakers were amenable to reconfiguring the regulation of commodity (trade) options.

[329] Commodity Options, 77 Fed. Reg. 25334 (2012).

The choice to issue a new trade option exemption can also provide insight into how CFTC policymakers conceived of the Dodd-Frank imaginary at this rulemaking stage. In the final version of the “Commodity Options” rule, as with this rule’s predecessor, the Dodd-Frank imaginary principally guided policymakers towards bringing transparency to OTC markets and reducing their systemic risk. Nevertheless, due to those conditioning semiotic and extra-semiotic variables discussed immediately above, the manifestation of this imaginary in the context of OTC commodity derivative regulation was refined between the proposed and the final rule-making. Whereas in the proposed “Commodity Options” rule, all commodity and trade options would be treated as swaps and subject to all applicable transparency (i.e., reporting and recordkeeping) and systemic risk (i.e., clearing, margining, position limits) regulations, in the rule’s final version, qualifying trade options – typically transacted by commercial market participants and end-users and where the exercise of the option resulted in delivery – were allowed safe harbor from systemic risk-related regulations, but were still mandated to comply with transparency requirements (see below). As such, the Dodd-Frank imaginary’s refined meaning in connection with the regulation of commodity (trade) options was that its systemic risk mandates would not apply to some OTC commodity derivative transactions between (predominantly) commercial parties who intended delivery of the underlying optional contracted commodity.

Turning to the assembly of the trade option exemption’s three specific qualifying criteria, it is imperative to ascertain the origins of these conditions. To begin with, the first two criteria of the final “Commodity Options” rule’s exemption are largely analogous to the two requirements of the Commission’s historical, pre-Dodd-Frank trade option exemption, with one change.[330] In the new trade option exemption, the offeror of the commodity option would have to be either an 'eligible contract participant' (i.e., an entity having a minimum level of net worth) or a commercial market participant of some form, whereas its pre-Dodd-Frank version had no restrictions on who could sell a trade option. Nevertheless, the standard that was applied to the offeree in the new exemption was a verbatim match to that of its historically applied predecessor, thus requiring that the offeree be some form of commercial market participant.[331] Both of these criteria, however, marked a change from the exemption in the proposed "Commodity Options" rule as this version would have allowed only 'eligible contract participants' to be engaged in OTC commodity option transactions, thus possibly preventing some small commercial and end-users that had traditionally transacted trade options from continuing to use them.

The third element of the trade option exemption – requiring that the underlying commodity be delivered if the option is exercised – was a new addition. Two potential inputs into this criterion's creation should be considered. First, as mentioned above, some commenters to the proposed "Commodity Options" rule expressed that the prospectively intentional and routine physical settlement of commodity options should be viewed differently than financial settlement.[332] Second, the notion of limiting the scope of swap regulations to those transactions intended to be financially settled can be posited as an outgrowth of the above-mentioned intra-agency interactions between those individuals drafting the trade option exemption (i.e., members of the Agricultural Swaps Rulemaking Team) and those working on the forward contract exclusion to the final "Further

[330] Ibid., at 25324, footnote 28.
[331] Ibid.
[332] See, for instance, Letter from Catherine Krupka on behalf of Edison Electric Institute and Electric Power Supply Association, 4 April 2011, at 7f. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=35406&SearchText=.

Definitions" rule. Although it cannot be conclusively discerned if either of these inputs took precedence over the other, given the above discussion, it is safe to assume that both served in tandem to influence the language of this last criterion.

This terse exploration of the trade option exemption's three criteria reveals that while the exemption was requested by prospective regulatees, its textual contents cannot be solely attributed to the comments made by these parties. More specifically, although prospective regulatees and their representatives successfully lobbied the CFTC for a trade option exemption, they did not exclusively contribute to the language of its three qualifying criteria which defined what could be considered a fully regulatable swap and what could be considered an exempted trade option. Nevertheless, when taken together, the three requirements appear as an operationalized form of one aspect of the newly refined Dodd-Frank imaginary – establishing regulatory boundaries when pursuing systemic risk reduction. Through the exemption's qualifying conditions, financially settled commodity option transactions between non-commercial buyers and sellers were prohibited from accessing the trade option exemption, while commodity options intending to be physically settled and involving, at a minimum, a commercial buyer were allowed exemptive relief.[333] The three criteria for the trade option exemption present themselves as an offshoot of, and compossible with, the systemic risk mitigation function of the Dodd-Frank imaginary in that they deny safe harbor to transactions of non-commercial parties financially settling their OTC derivatives (e.g., systemically important financial institutions), while still providing a regulatory structure – albeit less stringent – for the heterogeneous transactions of commercial participants in the physically deliverable OTC commodity derivative space.

[333] Commodity Options, 77 Fed. Reg. 25332f (2012).

The regulatory structure that was applied to exempted trade options required that these contracts comply with recordkeeping and reporting conditions. Through these requirements, the other aspect of the Dodd-Frank imaginary is apparent – the promotion of transparency in OTC (commodity) derivative markets, especially by way of recordkeeping and reporting of exempted trade option activity. Analyzing the application of these two regulatory requirements to exempted trade options comprises the last portion of the instant CPE-based analysis of the final "Commodity Options" rule.

On that score, until the new trade option exemption was issued by the CFTC, permitted OTC commodity (trade) options were transacted in opacity and away from the agency's gaze. This meant that when Commission policymakers drafted their final commodity options regulations, they had "virtually no regulatory visibility into [the marketplace's] composition and scope."[334] Nevertheless, as one of the two pillars of the Dodd-Frank imaginary was to guide agency officials towards bringing transparency to opaque OTC derivative markets, these policymakers undertook this endeavor in their development of the trade option exemption.

The manifestation of this aspect of the Dodd-Frank imaginary in regulatory form witnessed Commission officials craft a two-tier system for recordkeeping and reporting of exempted trade options. As stated earlier in this chapter, the tiers involved were as follows: (1) apply recordkeeping requirements based on whether the party is or is not a swap dealer or major swap participant, and on whether a party to a mere trade option is already reporting swaps (if the latter, then the trade option must be reported as would be a generic swap (i.e., in real-time)); and (2) where neither party to a trade option is reporting swaps, then the parties to the trade option are required to simply file a yearly Form TO. Here, the

[334] Ibid., at 25330.

Dodd-Frank imaginary can be seen as facilitating the structure of the two-tier recordkeeping and reporting scheme for exempted trade options. Congruent with the imaginary's focus on transparency and systemic risk reduction, the recordkeeping and reporting conditions for trade options necessitated that systemically risky firms, as well as those entities already transacting swaps, comply with stricter regulations than commercial market participants not engaged in potentially systemically risky swap activities. Thus, this imaginary's influence is, arguably, apparent in policymakers' application of transparency requirements subject to a risk-weighted, two-tier compliance structure for recordkeeping and reporting of trade option transactions.[335]

It is vital to note that in their comment letters, prospective regulatees and their representatives did not encourage the CFTC to apply recordkeeping and reporting requirements to exempted trade options.[336] Although a trade option exemption was issued, it carried with it recordkeeping and reporting requirements, which meant that no trade option users would escape compliance costs associated with these instruments' use. As such, it can be surmised that the application of this regulatory framework was not the outgrowth of formal or informal lobbying done by prospective regulatees or by their representatives.

Instead, the key to understanding the imposition of recordkeeping and reporting requirements on exempted trade options lies in policymakers' explicit intent to bring

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[335] Nevertheless, as stated by a fellow commissioner at a CFTC meeting, Commissioner O'Malia allegedly introduced the concept of a two-tiered approach to recordkeeping and reporting compliance during the final rule-making. While this tiered approach was plausibly conditioned by the Dodd-Frank imaginary, the administrative decision to have two tiers of recordkeeping and reporting requirements for exempted trade options – one for those entities either engaged in swap activity or qualifying as a swap dealer or major swap participants and one for commercial parties who do and are neither – could be attributable to a senior policymaker's intervention during rule-making. See Open Meeting to Consider Two Final Rules, 12 April 2012, Washington, D.C., at 54.
[336] See the comment file at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=968.

transparency to the historically opaque OTC commodity options marketplace – a core aspect of Chair Gensler's regulatory vision for all regulatable OTC derivatives. As CFTC policymakers stated in the final "Commodity Options" rule: "Given that one of the purposes of the Dodd-Frank Act is to increase market transparency and regulatory visibility into OTC markets, however, the Commission does not believe an exemption with no attendant recordkeeping or reporting requirements for commercials is a reasonable alternative."[337] Thus, the introduction of a recordkeeping and reporting framework was an expression of CFTC policymakers' view – influenced by the articulated regulatory perspective of the agency's chairperson – that the transparency requirements of Dodd-Frank – and its related imaginary – were applicable to even exempted trade options, and not just plain swaps.

The Forward Contract Exclusion of the Further Definitions Final Rule

The final forward contract exclusion to the 'swap' definition was issued as interpretive guidance within the final "Further Definitions" rule. This exclusion constituted a restatement of its proposed form with several clarifications which were developed by policymakers in response to outside party comments. As with its earlier version, this forward contract exclusion stopped qualifying transactions from being regulated as a swap (or as a futures contract), and, therefore, having to comply with the above discussed Dodd-Frank post-trading regulatory infrastructure.

In the final "Further Definitions" rule, several key components of the proposed forward contract exclusion were sedimented in law. These components were: (1) extending the Brent Interpretation to apply to the 'swap' definition, (2) withdrawing the 1993 'Energy Exemption' and allowing all nonfinancial commodities – not just energy commodities –

[337] Commodity Options, 77 Fed. Reg. 25333 (2012).

access to the regulatory safe harbor of the Brent Interpretation, and (3) applying the CFTC's traditional 3-part test, referenced above, as well as the Commission's facts and circumstances approach to determine whether a forward agreement with an embedded option qualifies for the forward contract exclusion. Additionally, in this release, the Commission reiterated that it would interpret the exclusion, including all associated legal precedent, consistent with its historical interpretations (in relation to futures contracts) and the Dodd-Frank Act's legislative history.[338] This meant that the CFTC would view the intent to deliver a commodity as the primary, though not only, consideration when assessing whether an OTC commodity derivative could qualify as an excluded forward contract, and that it would look to the transaction's "facts and circumstances" to assess the "parties' expectations or intent regarding delivery" of that commodity.[339]

To this point, in connection with extending the Brent Interpretation and withdrawing the 1993 'Energy Exemption', the guidance given by Commission policymakers provides perspective on the considerations to which they would grant significance when determining whether an OTC commodity derivative transaction (e.g., a 'book-out'; see Chapter 8) would find safe harbor (as a forward contract) and be excluded from regulation as a swap. For such a transaction to qualify for this safe harbor under the Brent Interpretation, the parties thereto would have to be commercial market participants that "regularly make or take delivery of the referenced commodity in the ordinary course of their business," with delivery of this commodity being possible and ultimately intended throughout the duration of the agreement.[340] Although this safe harbor extended only to

[338] Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48227f (2012).
[339] Ibid., at 48228.
[340] Ibid., at 48228-30.

'book-outs' trades, it evidences that physical settlement would a significant component to the forward contract exclusion.

The focus on delivery intention was also broadly emphasized through the final forward contract exclusion's formalization of the 3-part test for forward contracts with embedded commodity options (see Chapter 8), and more specifically through the Commission's creation of a follow-on 7-part test.[341] Here again, the CFTC would look to the facts and circumstances of a transaction to evaluate whether the agreement in question satisfied all elements of the test(s) and could, thus, be treated as an excluded forward contract. The newly created 7-part test – developed in response to outside party comments received by the agency – would assess the applicability of the exclusion to those otherwise forward contracts in nonfinancial commodities containing volumetric options.[342] This 7-part test would be available, on a supplemental basis, for those OTC commodity derivative transactions between commercial parties which failed the second element of the 3-part test because of the presence of embedded volumetric optionality.[343] An example of such an instrument would be an agreement between two commercial parties where a buyer agrees to purchase 10,000 tons of iron ore at a future date, to be delivered at a designated location for a specific price, but can elect to purchase an additional 5,000 tons of the ore.

In addition to a commercial market participant requirement, elements one through six of the 7-part test required that the seller and buyer always intend to make or take delivery, respectively, that the embedded option not undermine the transaction's nature as

[341] Ibid., at 48237.

[342] To clarify this term once more, embedded volumetric optionality refers to the variable amount of a commodity to be delivered (sold) or received (purchased) as stipulated in the terms and conditions of an OTC forward contract.

[343] See Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238-40 (2012). This failure being attributable to the embedded option targeting the contract's "delivery term" (i.e., the amount of commodity delivered); thus, creating volumetric optionality.

a forward agreement (so that its predominant feature remains actual delivery), and that the embedded optionality not be "severed and marketed" separately from the overall forward contract.[344] The seventh element of the test, whose ambiguous language would prompt myriad communications from prospective regulatees, conveyed that if the exercise of embedded volumetric optionality was at the option holder's full discretion, this would preclude a contract from qualifying for the forward contract exclusion. More specifically, this seventh part required that "the exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors,[345] or regulatory requirements,[346] that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity."[347]

This meant that, in the case of the above iron ore example, if the embedded volumetric option for 5,000 additional tons of ore is exercised (or not) by the purchaser for economic reasons alone, it would fail this last element of the 7-part test and would not be eligible for the forward contract exclusion. Nevertheless, if the option for the 5,000 additional tons was, for instance, not exercised due to a catastrophic fire at the buyer's ironworks (i.e., a physical factor), or if the buyer exercised the option because the government demanded increased production from the ironworks for purposes of urgent national defense (i.e., a regulatory requirement), then the agreement would qualify for the

[344] Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238 (2012).
[345] Although a formal definition is not provided, in its understanding of the term 'physical factors', the CFTC references things such as weather and operational considerations. See Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238 at footnote 399 (2012).
[346] Similarly, no definition is given, but the term is assumed to reference volumetric optionality which a commercial entity is mandated by law to maintain. See Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238 at footnote 340 (2012).
[347] Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238 (2012).

exclusion due to meeting, among other requirements, the seventh element of the above test. By tying the exercise or non-exercise of an option within a forward contract to factors for which the party holding the option may not have control, the CFTC would look to the facts and circumstances behind the intentions of exercising (or not) the option when testing the OTC commodity derivative contract's fitness to be excluded from regulation as a swap (or futures). In general, the 7-part test put forth a limited range of criteria that would allow a transaction containing volumetric optionality access to the forward contract exclusion.

As a part of their guidance concerning which contracts may or may not qualify for the forward contract exclusion, agency officials made it clear that neither the titular name on an agreement nor the Commission's guidance pertaining to specific types and kinds of OTC commodity derivative transactions would prospectively prescribe exclusion from swap (and futures) regulations.[348] Rather, CFTC policymakers repeatedly stated that it would look to the facts and circumstances of each OTC commodity derivative transaction as a whole when assessing the applicability of the forward contract exclusion.[349] Nevertheless, the omnipresent thread found in the agency's guidance was that to qualify for the exclusion, an intention to physically settle the volumetric option within a forward contract must, at the very least, be evident and demonstrable.[350]

To summarize, as interpretive guidance, the forward contract exclusion of the final "Further Definitions" rule advised OTC commodity derivative users to the combination of factors signifying whether such instruments would be treated as swaps or as excluded forward contracts. Through the provision of an expanded Brent Interpretation and the

[348] Ibid., at 48241.
[349] Ibid. This meant that parties to forward contracts with embedded options would need to apply this same standard to determine if the transaction necessitated further compliance with swap regulations.
[350] See Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48239-44 (2012).

narrow criteria of the two tests, the Commission highlighted that optionality – often relating to the intent to deliver the agreement's underlying commodity – would be the prevailing variable in any regulatory determination. Additionally, the guidance indicated that the CFTC would not grant prescriptive exceptions to OTC commodity derivative transactions, but would instead look to the transactions' facts and circumstances when assessing a contract's fitness for the forward contract exclusion.

Voting to adopt the final "Further Definitions" rule was successful by a margin of 4 to 1, but the Commission requested comment by interested parties on its interpretation regarding forward contracts with embedded volumetric optionality.[351] The lone dissenting vote was cast by Commissioner Bart Chilton.[352] In the Commissioner's statement of dissent, Chilton indicated that his sole objection to the rule was what he perceived as an insufficiently critical regulatory approach to certain transactions claiming the forward contract exclusion and being excepted from regulation under Dodd-Frank.[353]

An Analysis of the Final Forward Contract Exclusion

In beginning a CPE-informed analysis of the construction of the final "Further Definitions" rule's forward contract exclusion, it is imperative to reiterate that, as stated above, the three components of the exclusion's proposed form were adopted in its final version. This is evident from a couple of facts. For starters, in the end the CFTC ultimately adopted its original proposal of an extension of the Brent Interpretation granting certain OTC commodity derivative trading practices safe harbor from Dodd-Frank swap regulations and its expansion to cover such trading practices in all nonfinancial commodities. Added to this

[351] Ibid., at 48363.
[352] Ibid.
[353] Ibid., at 48363-6.

is the Commission's adoption of its proposed 3-part test to determine the regulatability of forward contracts with embedded options. All this indicates that, through the period between the issuance of the proposed and final interpretive guidance, the way in which CFTC policymakers conceived of these facets of the forward contract exclusion remained largely unchanged. Moreover, the retention of these originally proposed (i.e., selected) approaches indicates that, from the vantage of CPE, their semiotic and extra-semiotic supports were overwhelmingly maintained from one rulemaking stage to the next. Although Commission officials further elaborated their guidance on the expanded Brent Interpretation and the 3-part test in response to the remarks of interested party commenters, the core of these proposals were, nonetheless, sedimented in the final "Further Definitions" rule because of the continuity provided their basis being neither contested by prospective regulatees nor at odds with the Dodd-Frank Act and agency precedent.

Two additional items from this final iteration of forward contract exclusion require analysis from the standpoint of the CPE-posited lenses of semiosis and structuration: (1) the reinforcement of an 'intent to deliver' standard and (2) the creation of the 7-part test.

In the context of Dodd-Frank, the 'intent to deliver' standard ensured that transactions in nonfinancial commodities for future delivery were free from swaps regulations, so long as the transaction was intended to be physically settled. Implied by this – and essential to the 'intent to deliver' standard – are that the transaction create a binding delivery obligation and that parties thereto must be capable of and actively participating in making or taking delivery. Thus, in principle, the exclusion encompasses OTC commodity derivative transactions normally entered into by end-users and commercial market participants – some of whom may coincidentally be swap dealers, such as the energy company BP. Moreover, by requiring intention of delivery, the forward contract exclusion, again, in principle, precludes financially settled agreements – e.g., swaps between non-commercial entities – from gaining access to the exception's regulatory safe harbor.

The inclusion of an 'intent to deliver' standard as the basis for evaluating if an OTC commodity derivative agreement would qualify for the forward contract exclusion stems from, as discussed in Chapter 8, both CFTC precedent in relation to futures regulations, and the explicit provision by Dodd-Frank that "a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled[,]"[354] cannot be regulated as a swap. This standard, as alluded to in the previous chapter, thus derives its principal semiotic influence from Dodd-Frank and historic agency precedent. Comment letters of prospective regulatees also provided discursive support to this regulatory approach. A review of the comment file reveals backing for the continuation of excluding contracts from swap regulations where there is intent to deliver the underlying commodity,[355] signifying that this key element of the forward contract exclusion was palatable to prospective regulatees. For instance, in their comment letter, the American Gas Association – a natural gas industry trade group – agreed that "the definition of a 'swap'" excluded those OTC commodity derivative transactions where delivery was intended and that this standard should be central to the forward contract exclusion.[356] Likewise, in its letter, energy company ONEOK supported this standard and further communicated to the CFTC its view that through the Dodd-Frank Act, Congress specifically

[354] Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51430 (2010).
[355] See comment file, available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1032.
[356] See Letter from American Gas Association, 23 March 2012, at 15. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=57276&SearchText=.

excluded from any prospective definition of a ‘swap’ those OTC commodity derivative contracts where the parties thereto intended physical settlement.[357]

It should be noted, however, that one non-industry commenter, Better Markets, expressed in its comment letter to the agency its reservations concerning the ‘intent to deliver’ standard as crafted in the forward contract exclusion to the proposed “Further Definitions” rule. Although Better Markets, a non-industry, public advocacy group that routinely contributes its perspectives on financial regulatory matters, supported applying an ‘intent to deliver’ standard in a forward contract exclusion, after the CFTC’s publication of the proposed exclusion, it asked agency policymakers to take a more precise stance on the standard’s meaning.[358] Better Markets suggested that the Commission include evidentiary requirements for entities claiming that they intended to deliver a commodity under a forward contract exclusion.[359] This was requested because, in the organization’s opinion, the proposed forward contract exclusion was unclear in its exposition on the notion of ‘intent’ and could, thus, be exploited as a loophole by business.[360] While the request for a specific evidentiary requirement to determine intent was not included the forward contract exclusion of the final “Further Definitions” rule, at least in the spirit of the expanded and elaborated final forward contract exclusion, particularly with its relatively limited exclusionary criteria and restrictive tests, at least a modicum of discursive influence from this letter can be posited.

[357] See Letter from Paul M. Architzel, WilmerHale, on behalf of ONEOK, Inc., 22 July 2011, at 7. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47923&SearchText=.
[358] See Letter from Dennis Kelleher, Better Markets, Inc., 22 July 2011. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47905&SearchText=better%20 markets.
[359] Ibid.
[360] Ibid., at 5f.

The decision by Commission policymakers to retain and elaborate on the 'intent to deliver' standard as an element central to their understanding of the final forward contract exclusion must also be considered alongside several extra-semiotic factors.

In considering such factors from the perspective of the discursive selectivity, as alluded to above, the Dodd-Frank Act provided the initial language for intention to deliver to be a part of a forward contract exclusion, and, thus, set the discursive boundaries within which rule-making on this topic could carried out. In regards to the structural selectivity, Dodd-Frank's provision that 'intent to deliver' be used as a standard in determining the constitution of an excluded forward contract is also noteworthy because it bound CFTC policymakers to its use as the basis upon which to issue further interpretive guidance. Furthermore, agency precedent and the Commission's historic use of an 'intent to deliver' standard – particularly stemming from its 1990 Brent Interpretation and subsequently promulgated related guidance – can also be seen as a wellspring for discursive and structural support to this aspect of the forward contract exclusion in the final "Further Definitions" rule. As noted by Commissioner Chilton in his voting statement on the final rule: "The Commission […] is now adopting an approach to the forward contract exclusion that draws on 'the principles underlying' the Brent Interpretation."[361]

Regarding the technological selectivity, comment letters on the forward contract exclusion of the proposed "Further Definitions" rule from industry interests and other outside parties produced a reservoir of intellectual resources that policymakers could draw on when gauging the efficacy and possible effects of the 'intent to deliver' standard as applied to OTC commodity derivative transactions. This pool of intellectual resources included information on an array of OTC commodity derivative contracts in use by

[361] Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48363 (2012).

prospective regulatees for which these commenters sought interpretation as to the instruments' regulatability. The information about these contracts and transactions provided by prospective regulatees in comment letters was ostensibly used by agency policymakers to develop their novel interpretive guidance concerning how such OTC commodity derivative activity would fit within their conception of the 'intent to deliver' standard as expressed in the final forward contract exclusion.

The final extra-semiotic factor to considered can be approached from the matter of the agential selectivity. As stated in the previous chapter, CFTC Chairperson Gensler's approach to Dodd-Frank era rulemaking was characterized, by no less than himself, as closely following the strictures and dictates of the statute. Being that Gensler, arguably, had the most influence of any policymaker over the agency's regulatory agenda, the primacy of the 'intent to deliver' standard in the forward contract exclusion – one which finds its discursive basis in the language of Dodd-Frank – fits with this conception of Gensler's influence in guiding rulemaking efforts. To this point, in the meeting during which commissioners voted on the final "Further Definitions" rule, Gensler implied that he approved of the rule's close adherence to Dodd-Frank and agency precedent. As he put it: "I believe that what we're doing today, the interpretation and the exclusions therein, are consistent with our precedent and consistent with what Congress laid out."[362] Moreover, as evidenced in several his speeches,[363] Chairperson Gensler was amenable to the concerns of

[362] Open Meeting to Consider Final Rule on Further Definition of the Term "Swap," Final Rule on the End-User Exemption to Clearing, and Proposed Rule to Exempt from Clearing Certain Swaps by Cooperatives, 10 July 2012, Washington, D.C., at 50. Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission11_071012-trans.pdf.

[363] See, for instance, Testimony Before the U.S. House Committee on Agriculture, Chairman Gary Gensler, 21 June 2011. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-88; Remarks on Dodd-Frank Financial Reform at George Washington University Law School, Chairman Gary Gensler, 2 March 2012. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-106; and

OTC commodity derivative marketplace participants, and was supportive of clarifying the final forward contract exclusion[364]; a task undertaken through final rule-making.

Placing an 'intent to deliver' standard at the center of the forward contract exclusion was influenced by the intersection of the semiotic and extra-semiotic factors reviewed above. The principal consideration from the foregoing analysis, however, is that emphasizing delivery intention, in any assessment of an OTC commodity derivative transaction's qualification for the forward contract exclusion, emerged from the text of the Dodd-Frank Act, and both corresponded to existing agency regulatory practices, and found broad support among outside parties and influential Commission policymakers, such as Chair Gensler. Nevertheless, from the proposed to the final stage of this rule-making, an elaboration of what this 'intent to deliver' standard meant was undertaken in response to numerous interested party comment letters. This suggests that these letters prompted some degree of variation in the discursive basis for the regulatory approach, but a variation which served only to expand on (and not contest) the selected and retained notion of 'intent to deliver'.

The other item in the final forward contract exclusion that requires analysis is the 7-part test for forward contracts containing volumetric optionality. Within this new test, intention of delivery – particularly the circumstances in which delivery might or might not occur – likewise factored prominently. The impetus for the test's creation is explored below.

Remarks on Dodd-Frank at the 6th Annual Capital Markets Summit, Chairman Gary Gensler, 28 March 2012. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-110.

[364] Open Meeting to Consider Final Rule on Further Definition of the Term "Swap," Final Rule on the End-User Exemption to Clearing, and Proposed Rule to Exempt from Clearing Certain Swaps by Cooperatives, 10 July 2012, Washington, D.C., at 50.

To restate, the 7-part test was developed in response to outside party comments to a CFTC solicitation for perspective on the applicability of the forward contract exclusion to those forward contracts with embedded volumetric options – a topic not addressed in the forward contract exclusion of the proposed “Further Definitions” rule.[365] Prospective regulatee commenters argued that although forward contracts containing volumetric optionality might not satisfy all elements of the finalized 3-part test – because these agreements targeted the “delivery term” of the underlying commodity and not its contracted price, which meant that they failed this test’s second condition – such instruments still warranted exclusion from swap regulations because they were intended to be physically settled.[366] CFTC policymakers agreed that forward contracts containing volumetric options could qualify for the exclusion, and affirmatively codified this understanding through the 7-part test.[367] These officials’ decision was plausibly supported by both the language and the structure of the Dodd-Frank Act for the same reasons reviewed above in the case of the ‘intent to deliver’ standard. To be excepted from swap regulations, delivery of the exercised option – irrespective of its nature as volumetric or otherwise – had to be intended.

Insofar as prospective regulatees were successful in having a business practice (i.e., the use of forwards with embedded volumetric optionality) codified into agency policy, it can be argued that the CFTC’s inclusion of this practice in its interpretive guidance on the final forward contract exclusion represents a fruitful exercise of these parties’ instrumental power (i.e., lobbying). This was specifically facilitated through prospective regulatees’ provision of comment letters and the intellectual and discursive resources stemming

[365] Further Definition of ‘Swap,’ ‘Security-Based Swap,’ and ‘Security-Based Swap Agreement’; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238 (2012).
[366] Ibid.
[367] Ibid.

therefrom. Entities providing such resources included, among others, public utilities, private energy firms, and energy industry trade groups. Nevertheless, as the 7-part test facilitated only a narrow set of potential circumstances under which an OTC commodity derivative contract containing volumetric optionality might attain an exception from swap regulations, neither the test's seven elements, nor the function of the test as a whole appear to favor the interests of these prospective regulatees. This notwithstanding the fact that the linchpin of the test – its seventh element – contains two exclusionary circumstances – uncontrollable physical factors and regulatory requirements – which derived from disparate comment letters expressing their authors' experiences with and interpretations of 'intent to deliver' under these two circumstances.[368] (These two circumstances are limited in scope to those situations largely outside of a party's control. As such, their inclusion in the 7-part test cannot be considered evidence of an agency beholden to industry interests.)

As with the final "Commodity Options" rule, through the forward contract exclusion of the final "Further Definitions" rule, the Dodd-Frank imaginary underwent refinement. The modifications to the forward contract exclusion analyzed above indicate that the Dodd-Frank imaginary was refined such that a narrow segment of OTC commodity derivative transactions (containing some form of optionality) between commercial entities where delivery was intended would be excluded from the transparency and systemic risk reduction regime towards which the imaginary guided Commission policymakers. Should an OTC commodity derivative not qualify for the forward contract exclusion, it would, however, be subject to transparency (i.e., reporting and recordkeeping) and systemic risk

[368] For discussions of physical factors, see Letter from Lisa Yoho, BG Americas & Global LNG, 22 July 2011; and for regulatory requirements see Letter from Mary Anne Mason, HoganLovells, LLP on behalf of Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas and Electric Company, 22 July 2011. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1032.

mitigation (i.e., clearing, margining, and position limits) regulations. The alterations to the meaning of this imaginary in the context of the forward contract exclusion were an outgrowth of the interacting and co-evolving semiotic and extra-semiotic variables discussed in this sub-section.

CONCLUDING REMARKS

In the CPE-informed analyses of the final “Commodity Options” rule and the forward contract exclusion of the “Further Definitions” final rule, this chapter has explored how Commission policymakers constructed the regulation of OTC commodity derivatives during final rulemaking. In regard to the former rule, policymakers retained their approach to treating commodity (trade) options as swaps, but their stance on trade options changed after contestation from prospective regulatees, which prompted the CFTC to grant a new trade option exemption. To access this exemption, a compliance structure was established to ensure that parties to trade options were by and large commercial market participants who intended to deliver the contract’s underlying commodity and to provide the agency with insight into the marketplace through recordkeeping and reporting obligations. Concerning the forward contract exclusion, its proposed form was retained in the final “Further Definitions” rule with a few clarifications and included a newly created 7-part test for forward contracts containing embedded volumetric options. Through these, agency policymakers elaborated, respectively, on the “intent to deliver” standard used to assess an OTC commodity derivative’s qualification for the exclusion, and on the conditions under which a forward contract with embedded volumetric optionality would be excluded from swap regulations.

From the standpoint of this paper’s CPE theoretical framework, two aspects of the foregoing analysis are important to restate. First, the regulations for OTC commodity derivatives underwent a process of variation, selection, and retention as rulemaking progressed from the proposed stage to the final rule stage. What has been discussed suggests that outside party comments were the primary, though not the only, impetus for variation (e.g., a reconsideration or elaboration of a regulatory approach). Furthermore, both the selection of a regulatory approach and its retention were contingent on an array of co-evolving semiotic and extra-semiotic factors. These included a consistent message expressed by outside party commenters coupled with access to and the influence of influential policymakers (e.g., Chair Gensler) within the bounds afforded by the terms of the Dodd-Frank Act itself. While the foregoing analysis might suggest that commodity industry actors were able to influence some aspects of OTC commodity derivative final rulemaking – such as the addition of a trade option exemption or the inclusion of a 7-part test – wholescale capture of the rulemaking effort by industry is not apparent. This is because neither the decision to issue a new trade option exemption, nor the content of and regulations associated with the two most important features of the final rules – the trade option exemption and the 7-part test – were either fully attributable to or beneficial to (from a cost reduction vantage) prospective regulatees.

The second item warranting mention is that, with regards to the Dodd-Frank imaginary, its meaning in the context of the OTC commodity derivative marketplace was refined between the publication of the proposed and final rules. As is suggested by the foregoing discussion of this imaginary, and its relation to the final "Commodity Options" rule and the final forward contract exclusion, there was cross-rule convergence as to the imaginary's refined meaning. Specifically, while all options (and optionality) would, in the first sense, qualify an OTC commodity derivative as a swap, and, thus, leave it subject to transparency and systemic risk reduction regulations, through the reviewed final rule-makings, Commission policymakers added two caveats. These were that transactions by commercial parties, such as commodity end-users, where delivery of the contracted (optional) commodity was intended, would be either exempted from systemic risk regulations or, in limited circumstances, excepted from regulation as a swap. The refinement of the Dodd-Frank imaginary in this manner was, as suggested in this chapter, prompted by the comment letters of prospective regulatees and other interested parties, and propelled by other semiotic influences intersecting with their extra-semiotic counterparts.

Although in the final rule for commodity options, and the final interpretive guidance on the forward contract exclusion, the CFTC moved to finalize its regulatory approach to OTC commodity derivatives, their issuance would not mark the end of rulemaking. Comment periods would be left open for both the interim final trade option exemption and the nebulous 7-part test, therefore allowing the rule-making process for these issues to ostensibly return to – in the terminology of CPE – a stage of variation as a result of outside party comment. This meant that an opening existed for regulatees to further contest Commission policymakers' construction of OTC commodity derivative regulations. Nevertheless, as the next chapter of this thesis will explore, major changes to the composition of CFTC leadership, and in the articulated regulatory vision that this group expressed, fomented an evolution in the regulatory approach to OTC commodity derivatives and the Commission's Dodd-Frank imaginary. What would emerge from this ultimate rulemaking period would be regulations which further exempted or excepted the activities of OTC commodity derivative commercial marketplace participants and end-users.

INTRODUCTORY REMARKS

Between 2012 and 2016, the CFTC revisited its interpretive guidance on the matter of forward contracts containing embedded volumetric optionality (as codified within the forward contract exclusion), as well as the trade option exemption of its rule for commodity options. As noted in the previous chapter, the issues of embedded volumetric optionality and trade options were subject to an additional post-rule adoption comment period. (The other components of the final forward contract exclusion and the final "Commodity Options" rule were not, however, open for comment and remained unchanged.) Therefore, the Commission left available the possibility of a return to rulemaking to revise both its treatment of forward contracts with embedded volumetric optionality and that of trade options. With Chairperson Gensler's 2014 retirement from the agency, and the with the arrival of a new Chair and new commissioners shortly thereafter, CFTC personnel, guided by newly confirmed Chairperson Timothy Massad, undertook a review of the Commission's existing OTC commodity derivative regulations which affected commercial end-users[369] (and particularly non-swap dealers and non-major swap participants).

Formal amendment of the aforementioned regulations began with the November 20, 2014 publication of the standalone proposed interpretation for "Forward Contracts with Embedded Volumetric Optionality" ("Proposed Guidance"), and continued with the May 18, 2015 release of the final interpretation for "Forward Contracts with Embedded Volumetric Optionality" ("Final Guidance"). Together, these modified the qualifying criteria for the

[369] This term is used to denote both true end-users of nonfinancial commodities – such as a natural gas-fired electrical plant – and commercial marketplace participants/commercial parties – such as nonfinancial commodity wholesalers, nonfinancial commodity storage and transportation companies, and energy and metals producers and processors.

forward contract exclusion for those OTC commodity derivative contracts containing volumetric optionality. The trade option exemption was changed through the May 7, 2015 proposed "Trade Options" rule, and ultimately by the March 21, 2016 final "Trade Options" rule.

Following the CPE theoretical framework, this chapter analyzes these particular rule-makings in an effort to elucidate how CFTC policymakers constructed the regulations for OTC commodity derivatives during this terminal rulemaking sequence. After this introduction, Chapter 10 begins with a concise exploration of the institutional context in which the forward contract exclusion and the regulations for trade options were revised, and in doing so, highlights the importance of the arrival of new leadership at the Commission on the agency's regulatory mission. Utilizing the specific rule texts as entry points for analysis, the chapter then reviews the rulemaking sequence and analyzes those semiotic and extra-semiotic factors which interacted and co-evolved to condition the codified amendments to the forward contract exclusion and the new rule for trade options.

Through analyzing the revised forward contract exclusion and trade option exemption rule-makings from a CPE perspective, it is shown that substantive changes to the way in which policymakers approached the construction of their rules for the regulation of OTC commodity derivatives occurred. In particular, Commission policymakers reoriented their approach to the exclusion and exemption as part of an amended regulatory mission – articulated and advanced by new agency leadership (particularly new Chair Massad) with the capacity to set the institution's agenda – which sought to address the concerns of OTC commodity derivative commercial end-users and to create a different regulatory standard for such marketplace participants. This new standard was informed by the comment letters submitted by commercial end-users, and groups representing their interests, and had the effect of either excepting or exempting many OTC commodity derivative transactions of commercial end-users (especially non-swap dealers and non-major swap participants) from compliance with Dodd-Frank era swap regulations (i.e., the post-trade regulatory infrastructure: recordkeeping, reporting, margining, clearing, and position limits). From this, it is argued that the Dodd-Frank imaginary of CFTC policymakers was, through the CPE-posited process of variation, selection, and retention, reimagined to reflect changes to the significance these officials now gave to a party's status as a commercial end-user (or a non-swap dealer and non-major swap participant). In this, the Dodd-Frank imaginary evolved to reflect a new understanding of the Dodd-Frank Act's meaning in relation to OTC commodity derivatives. That understanding was one which guided policymakers towards improving transparency and reducing systemic risk of OTC commodity derivative transactions, at least insofar as marketplace participants were not commercial end-users.

A SUCCINCT OVERVIEW OF THE REVISED RULEMAKING CONTEXT

Before analyzing the revisions to the forward contract exclusion and to the trade option exemption, it is worth briefly remarking on the broader context in which revised rulemaking occurred. Following the final rulemaking events discussed in Chapter 9, there was continuity both in terms of the U.S. President – Barack Obama was reelected – and CFTC funding limitations. Nevertheless, in leading up to the 2014 restart of formal OTC commodity derivative rulemaking, two noteworthy contextual changes occurred: one to the agency itself, and one to the composition of the legislative branch of government. Between 2012 and 2014, the Commission had experienced significant turnover both in leadership (chair and commissioners) as well as in other key policymaking divisions, such as at the Office of General Counsel (i.e., the CFTC's legal department).[370] And, in late 2014, a midterm (non-presidential) election resulted in the Senate – and the CFTC's governing Senate Agriculture Committee – slipping into the control of the Republican party for the first time since Dodd-Frank OTC commodity derivative rulemaking began.[371]

A major change to Commission leadership took place in January 2014 with the resignation of Chairperson Gary Gensler. With his departure, the agency lost, as the investment news publication *Institutional Investor* characterized him, "one of the most aggressive U.S. financial sector regulators in recent history."[372] To fill this opening at the CFTC, President Obama nominated Timothy Massad to replace Chair Gensler.[373] Prior to his nomination, Massad's professional career included political activism with pro-consumer protection leader and occasional politician Ralph Nader,[374] two decades at a major U.S. law firm specializing in investment securities matters, and a position in the U.S. Treasury Department overseeing the financial crisis era bank bailout scheme known as the Troubled Asset Relief Program (TARP).[375] Whereas Gensler's position on OTC derivative regulation was characterized by its aggressiveness and its demand for OTC marketplace-wide adherence to the spirit of the Dodd-Frank Act, as will be discussed in greater detail below, Massad arrived at the CFTC seeking to review OTC commodity derivative regulations

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[370] See Appendix A. See also, CFTC Announces Departure of General Counsel Dan M. Berkovitz, 8 March 2013. Available at: https://www.cftc.gov/PressRoom/PressReleases/pr6528-13.
[371] For election data on the Senate, see: https://www.nytimes.com/elections/2014/results/senate.
[372] Mossman, Matt. "As New CFTC Head, Timothy Massad Would Have to Play Enforcer". *Institutional Investor*, 5 February 2014. Available at: https://www.institutionalinvestor.com/article/b14zbgtwjfrkpy/as-new-cftc-head-timothy-massad-would-have-to-play-enforcer.
[373] Warmbrodt, Zachary. "Obama picks Massad for CFTC". *Politico*, 12 November 2013. Available at: https://www.politico.com/story/2013/11/barack-obama-timothy-massad-commodity-futures-trading-commission-099705.
[374] Ackerman, Andrew. "Challenges Await Commodity Futures Trading Commission Pick". *The Wall Street Journal*, 12 November 2013. Available at: https://www.wsj.com/articles/obama-to-nominate-massad-to-head-cftc-1384253414.
[375] Ibid.

specifically affecting commercial end-users and articulating a regulatory vision which espoused differentiating the fit of these entities within Dodd-Frank's post-trade infrastructure from financial entities (e.g., banks) as well as swap dealers and major swap participants.[376]

Although the exact origins of Massad's policy preference for differentiation between commercial end-users and financial entities engaged in transacting regulatable swaps cannot be definitively established as he was unable to be reached for an interview, two items relating to this preference should be considered here.[377] First, Chairperson Massad was of the view that commercial end-users of derivative instruments were not the cause of the 2007/2008 financial crisis that prompted the Dodd-Frank OTC derivative

[376] Applying a fully different regulatory standard to commercial end-users (e.g., a small energy company) that transact swaps was not seen as a viable approach during Gensler's tenure as head of the CFTC. As noted by one agency official: "So, you know, in the energy space – you're going to regulate banks that do energy; well aren't you going to regulate the energy companies that are essentially doing the same things like banks? And it's very difficult to say like, these things like, trade options, you know, you get into these – you try to make – and that's why you see it like in trade options, like the definition, in volumetric options and in the swap definition, you get these – like the five-part test or the seven-part test on the third factor of the five-part – and all that stuff is, you're chopping it so finely, you're trying to make these precise things when it's something in this category versus that category […] It's not so simple as just saying, 'Well one sector shouldn't be regulated.' Like I say, 'Why if a bank does energy – is a bank, that's regulated, that does energy, is sort of the same thing, it's not.'" (Interview, 10 October 2017, Washington, D.C.)

[377] Another perspective here is that Massad's nomination, and the adoption of his particular views towards regulation, could reflect, or in the case of the latter, flow from, a political preference on the part of President Obama (i.e., the President sought to nominate a candidate who either shared his regulatory vision or who would adopt it; which in this case, would correspond to relaxing regulations on end-users as evidenced by Massad's actions while serving as Commission Chair). Nevertheless, there is an absence of empirical evidence to support this position, and the anecdotal evidence to support such an assertion is tenuous. For example, it has been asserted that Obama's selection of Massad was a tacit renunciation of Gensler's tenure as CFTC Chair (even though Gensler was likewise an Obama selection); see Eisinger, Jesse. "Obama's Mystery Man for Derivatives". *ProPublica*, 20 November 2013. Available at: https://www.propublica.org/article/obamas-mystery-man-for-derivatives. Yet, in an exit interview, when asked about possible presidential political motivation as a factor behind his resignation, Gensler asserted that this was not the case and that his departure was voluntary; see Ashbrook, Tom. "Gary Gensler, Obama's Toughest Fighter for Wall Street Reform". *WBUR*. 5 December 2013. Available at: https://www.wbur.org/onpoint/2013/12/05/gary-gensler-cftc-wall-street.

reforms.[378] Thus, to follow this proposition, the full weight of the Dodd-Frank Act should not fall upon the shoulders of commercial end-users of OTC commodity derivatives (regulatable swaps) who were, presumably from Massad's perspective, bystanders to a banking-driven financial crisis. As he stated before a group of natural gas industry participants shortly after commencing his tenure as Chair of the CFTC:

> Commercial end users were not responsible for that crisis. And our challenge today is to implement this new regulatory framework in a way that achieves the important goals of bringing some transparency, sensible oversight, and prevention of excessive risk, while making sure that these markets still function effectively and efficiently for the many commercial firms that depend on them. After all, that should be the ultimate purpose of the derivatives markets – to help commercial companies manage their risks.[379]

And second, it is worth considering contemporaneous Congressional action directed at the CFTC's regulation of OTC commodity derivatives as a supplement to engage with the broader political-economic ethos of the post-final rulemaking period. Prior to Massad's assumption of the Chairpersonship at the Commission in 2014, members of the U.S. House of Representatives and the U.S. Senate put forth bills to statutorily address the concerns of OTC commodity derivative commercial end-users and to provide these entities with regulatory relief.[380] While the Senate bill was never brought to a full vote, and the House bill was not taken up by the Senate,[381] the proposed legislation does provide evidence of an ethos of awareness within Congress concerning commercial end-users. As will be discussed in the analysis to follow, these perspectives were pressed upon Massad,

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[378] See Remarks of Chairman Timothy Massad before the Natural Gas Roundtable (Washington, D.C.), Chairperson Timothy Massad, 26 May 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-23.

[379] Ibid.

[380] For the House bill, see H.R. 4413 – Customer Protection and End User Relief Act. Available at: https://www.congress.gov/bill/113th-congress/house-bill/4413. For the Senate bill, see S. 2330 – End-User Protection Act of 2014. Available at: https://www.congress.gov/bill/113th-congress/senate-bill/2330.

[381] Ibid.

and the two other nominated commissioners, during their Senate confirmation hearings. In those instances, Massad and the other nominees expressed openness to revisiting the CFTC's regulatory treatment of OTC commodity activities of commercial end-users. Thus, it is plausible that, if incoming Chair Massad looked to the actions and interpreted intent of Congress concerning commercial end-users of OTC commodity derivatives as well, those actions and intent could have served as an additional guide to the development of, and legitimation for, the policy preferences expressed in his regulatory vision.[382]

While exploring the development of this Congressional ethos is beyond the scope of this paper's inquiry into OTC commodity derivative rulemaking, one key insight should be mentioned. As indicated by an interviewee during research for this thesis, in the period after the Commission's adoption of the final "Commodity Options" rule and the forward contract exclusion of the final "Further Definitions" rule, commodity industry participants and representative trade groups did lobby Congress to intercede in CFTC rulemaking:

> Interviewee: And then you know they could also - and this happened a lot with the energy constituencies – go to Congress and say, 'Can you believe what these guys are doing? Why don't you write a letter to the CFTC saying': Don't do this or ask some of these questions at the authorization hearing, why are you doing this? Why are you penalizing all these hardworking American's who are growing the economy? They're not the big bad bankers. They're people on Main Street and – jobs – if you make them buy all these expensive systems for keeping track of their swaps, they're not going to be able to hire as many people and it will affect jobs. And there won't be as many – you know, natural gas won't come out of the ground and all this stuff. These are real companies. You know, this is real America. These financial regulations, you're hurting the real economy, not all these Wall Street people. Regulate Wall Street, don't regulate Main Street. The crisis was Wall Street's problem, not Main Street's. These are hardworking Americans trying to build up the country and they shouldn't be subject to all this excessive stuff.
>
> Interviewer: Is that the line that they were actually taking?
>
> Interviewee: Yeah. Yeah. (Interview, 10 October 2017, Washington, D.C.)

[382] Supporting this notion are the findings of Yackee and Yackee (2016) and Shipan (2004), both reviewed in Chapter 3.

ANALYZING THE REVISIONS TO THE FORWARD CONTRACT EXCLUSION AND THE TRADE OPTION EXEMPTION

Revisiting Embedded Volumetric Optionality in the Forward Contract Exclusion

Following the textual genre of the previously issued forward contract exclusion, the CFTC's reinterpretation of its regulatory treatment of forward contracts with embedded volumetric optionality came in the form of interpretive guidance. Through this guidance, both in its proposed and final forms, the agency amended portions of the 7-part test (see Chapter 9) and further clarified when an OTC commodity derivative agreement with an embedded volumetric option could be considered an excluded forward rather than a regulatable swap. The effect of this was the transformation of the 'intent to deliver' standard discussed in Chapter 9, thereby allowing for a wider range of facts and circumstances to meet the qualifying threshold for the forward contract exclusion.[383]

The Commission's "Proposed Guidance" altered its existing regulatory approach to forward contracts containing volumetric optionality in two significant ways. First, agency policymakers proposed rewording portions of the 7-part test. The principal change to this test was an adjustment of the seventh part. In the forward contract exclusion of the final "Further Definitions" rule, the seventh element read as follows: "The exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity."[384] The "Proposed Guidance" modified this element's language to the following: "The embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or

[383] Albeit indirectly, this action would help to either reduce or eliminate potential Dodd-Frank compliance costs associated with excepted forwards containing volumetric optionality.
[384] Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48238 (2012).

transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity."[385]

Whereas in the former, the CFTC interpreted the exercise or non-exercise of an embedded volumetric option due to those physical and regulatory events outside of the contracting parties' control as contributing to an agreement's status as an excluded forward contract, in the latter, the agency broadened the seventh element's exclusionary criteria to allow for the intentional inclusion of volumetric optionality into forward contracts for limited purposes. Put differently, this new seventh part expressed the Commission policymakers' perspective that volumetric optionality in a forward contract would not prevent a transaction from being excluded from swap regulations, so long as the embedded option was principally directed at increasing or decreasing the volume of commodity delivered and mainly dependent on anticipated physical or regulatory variables, and not principally on commodity price considerations. In essence, this portion of the "Proposed Guidance" loosened the criteria necessary for an OTC commodity derivative to qualify for the forward contract exclusion.

The second way the "Proposed Guidance" modified the agency's treatment of forward contracts with embedded volumetric options was through CFTC policymakers' explication of how they perceived the meaning of their changes to the 7-part test. (Because this was expressed as interpretive guidance, regulatees could rely on it when they assessed a transaction in light of the test and, thus, its qualification for the forward contract exclusion.) As a part of this explication, Commission officials stated that the seventh element's notion of "physical factors" should be changed to broadly encompass not only "environmental factors" like weather, but also considerations ranging from "the availability

[385] Forward Contracts With Embedded Volumetric Optionality, 79 Fed. Reg. 69074 (2014).

of reliable transportation or technology" to "changes in demographics or geopolitics."[386] Additionally, CFTC policymakers indicated that, should an embedded volumetric option be included in a forward contract, because either party anticipated the occurrence of an event over which they may have some control and which could affect the underlying commodity's supply or demand, such as industrial repairs or anticipated business growth, the optionality's inclusion at the agreement's initiation would not preclude the contract from satisfying the seventh element.[387] Finally, agency officials advised regulatees that they could rely on the representations of counterparties as to the purpose of the embedded volumetric option, so long as they were either unaware or "should not reasonably have been aware" of any fact contradicting such stated purpose.[388] Essentially, this meant that if one counterparty represented that the optionality satisfied the test's seventh element, the other generally could base its regulatory assessment on that statement.

Through these changes, the Commission conveyed an expanded understanding of the increased facts and circumstances leading OTC commodity derivative agreements with embedded volumetric optionality to qualify for the forward contract exclusion. In short, relative to its final "Further Definitions" rule predecessor, the "Proposed Guidance," *ceteris paribus*, allowed more transactions with such optionality access to the exclusion and, therefore, indirectly limited or eliminated potential Dodd-Frank compliance costs. With only four voting members on the CFTC at that time, the guidance was agreed to unanimously.[389]

[386] Ibid., at 69075.
[387] Ibid.
[388] Ibid.
[389] Ibid., at 69076.

After a 30-day comment period, the "Final Guidance" wholly adopted the language of the modified 7-part test.[390] In this ultimate release, Commission officials affirmed the above discussed aspects of their proposed interpretive guidance with one notable clarification. Through the "Final Guidance," agency policymakers reminded commercial parties that they generally could rely on the representations made by their contractual counterparties concerning the purpose of an embedded volumetric option, but clarified that no performance of due diligence into such statements was necessary.[391] This meant that if a party to a forward contract with an embedded volumetric option represented to the contract's commercial counterparty that the purpose of including the option satisfied the seventh element's conditions, then the counterparty essentially could rely on this representation without having to further inquire into its validity. As with its proposed form, the "Final Guidance" passed with the unanimous support of its four available voting members.[392]

To reiterate, these combined rulemaking events changed the qualifying criteria of the forward contract exclusion from that enunciated in the final "Further Definitions" rule for those forward OTC commodity agreements containing volumetric optionality. The chief modification in this revised interpretive guidance was to give approval to end-users' and commercial parties' intentional inclusion of such optionality into a deliverable forward contract, so long as the rationale for doing so predominantly related to broad categories of physical factors and regulatory requirements. While, if exercised, the embedded option would still be intended to result in delivery, this ultimate guidance expanded the conditions

[390] Forward Contracts With Embedded Volumetric Optionality, 80 Fed. Reg. 28241 (2015).
[391] Ibid., at 28242.
[392] Ibid., at 28243.

giving rise to such physical settlement that were deemed to be permissible under the forward contract exclusion.

Analyzing the Proposed and Final Guidance for the Forward Contract Exclusion

This analysis investigates how Commission policymakers constructed the changes that the "Proposed Guidance" made (and that were later adopted into the "Final Guidance") to the CFTC's previous position concerning the regulatory treatment of forward contracts with embedded volumetric optionality. As listed above, the principal alterations comprise modifying the 7-part test and redefining its meaning. Key to this CPE-informed analysis are assessments of two items. First, an exploration of the influences on CFTC policymakers' reinterpretation of its guidance on forward contracts with embedded volumetric optionality. Second, an examination of how this reimagined guidance intersected with a Dodd-Frank imaginary whose meaning, as manifested in regulations, was to bring transparency to OTC derivative markets and to mitigate systemic risk emanating from this marketplace.

In assessing the first of the foregoing two items, it is imperative to begin by briefly offering some observations on the significance of the request in the final "Further Definitions" rule for comment on the issue of embedded volumetric optionality. While the rule had been finalized as the Commission's assessment of forward contracts with volumetric options and then sedimented into regulatory text, the conceptual foundation upon which it rested was, nonetheless, subject to erosion through potential contestation. The Commission's request for comment left this matter open meant that the possibility existed for the agency to recast its guidance on such forward contracts in response to commentary of interested parties. Using the language of CPE, this denotes that a structural opportunity was in place for the rulemaking process to return to a stage of variation, wherein a variety of discourses and construals relating to the CFTC's regulatory approach towards forward contracts containing such optionality would be made available to contest existing regulations and/or inform further rule-making. Not only could these discourses and construals be provided by external, interested parties through comment letters, but, as explored below, these could also come from members of the agency itself.

Semiotic influences from both of the aforementioned sources played important roles in contributing to Commission policymakers' reinterpretation of the regulatory position on forwards with embedded volumetric optionality. Starting with those sources internal to the CFTC, the views of new Chairperson Massad and other commissioners, relating to the applicability of OTC commodity derivative regulations to end-users (e.g., a tire manufacturer using petroleum in production processes) and commercial market participants (e.g., a propane gas wholesaler), are essential components to understanding the Commission's change in regulatory stance. As can be gleaned from the preceding discussion of the "Proposed Guidance" and "Final Guidance," this change reflected a broader interpretation of the 'intent to deliver' standard explored in Chapter 9; one expanding the permissible facts and circumstances available for an OTC commodity derivative to access the forward contract exclusion. Because this exclusion excepts certain contracts from regulation as a swap, it is particularly useful to end-users and commercial parties who may not otherwise need to comply with the (potentially costly) post-trade infrastructure of the Dodd-Frank Act. The discourses advanced by Massad and fellow commissioners directly pertained to alleviating presumed Dodd-Frank regulatory burdens on these marketplace participants by modifying the regulation of the OTC commodity derivative instruments that they routinely used.

A prime example of this view comes from the U.S. Senate Agricultural Committee's March 2014 confirmation hearing for Obama-nominated Chairperson Massad, and Commissioners Bowen and Giancarlo. In his opening remarks to the Committee, the CFTC's future Chair intimated his intention to review the agency's OTC commodity derivative rules in light of end-user interests:

> As we implement important reforms, we must make sure the markets continue to serve their essential functions of providing hedging and price discovery for end-users. In this regard, I look forward to listening to the concerns of traditional end-users such as agricultural stakeholders, as well as participants in the markets newly subject to the CFTC's jurisdiction.[393]

Furthering this sentiment, in response to Senator Saxby Chambliss asking about his satisfaction with the Commission's granting of exemptions and exceptions to OTC commodity derivative end-users in the Dodd-Frank era, Massad emphatically stated that these parties should receive different regulatory treatment from significant participants in swap markets:

> Well, Senator, if confirmed, I want to make absolutely sure that we have. I think that is part of Congress's direction to us in providing the statutory basis to recognize that end-users, particularly non-financial commercial end-users, who are hedging commercial risk are treated differently than the financial entities that may be dealers or other participants in these markets.[394]

[393] United States. Senate. Committee on Agriculture, Nutrition and Forestry. *Commodity Futures Trading Commission Nominations of Timothy G. Massad, Sharon, Y. Bowen and J. Christopher Giancarlo*. *Hearings, March 6, 2014*. 113th Congress 2nd Session. Washington: GPO, 2015 (statement of Timothy G. Massad at 7). Available at: https://www.agriculture.senate.gov/imo/media/doc/CHRG-113shrg93026.pdf.
[394] Ibid. (statement of Saxby Chambliss, Senator, at 19f).

Nominated Commissioners Bowen and Giancarlo expressed similar opinions in their Committee testimony and in answers to Senators' questions. For instance, in regard to the CFTC's regulation of OTC commodity derivatives and their end-users, Bowen commented that regulatory costs on these parties should be limited: "Our markets need to work for […] end-users. So, our rules must be balanced and not create undue costs and burdens."[395] Giancarlo, meanwhile, indicated that the concerns of end-users would be "foremost" on his list of regulatory items to address once confirmed to the Commission.[396] Along these lines, he stated that he would "commit [himself] to attending to concerns of end-users."[397]

Together, these speech acts convey that key CFTC policymakers entering leadership positions in 2014 intended to emphasize the perspectives of OTC commodity derivative commercial end-users and to treat their trading activity differently in agency reviews of existing regulations. This is important because, first, it meant that high-level policymakers provided an opening for these entities to communicate their interests and to potentially influence any revision of the forward contract exclusion (and the trade option exemption). And second, it signified that an OTC commodity derivative party's status as a commercial end-user was becoming the principal consideration as Commission policymakers redetermined the extent to which Dodd-Frank era swap regulations applied to OTC commodity derivative transactions.

Additionally, incoming Chairperson Massad's answer to the question posed by Senator Chambliss is especially illuminating because it evidences his view that "non-financial commercial end-users" (e.g., a small potash mining company or a local electricity cooperative) occupied a different regulatory category – with potentially less stringent

[395] Ibid. (statement of Sharon Y. Bowen at 15).
[396] Ibid. (statement of J. Christopher Giancarlo at 14).
[397] Ibid., 10f.

regulations – than their swap dealing and major swap participating counterparts. The Chair's response previews the justification that he would give for agency policymakers' reinterpreting the CFTC's guidance on forward contracts with embedded volumetric optionality:

> One of my priorities has been to fine-tune our rules to make sure they work as intended and do not impose undue burdens or unintended consequences, particularly for the nonfinancial commercial businesses that use these markets to hedge commercial risks [...] This proposal is part of that effort.[398]

From these speech acts, as well as from numerous other public statements made between 2014 and 2015,[399] Massad arrived at the Commission advancing a discourse which espoused further differentiating the application of swap regulations based on a regulatee's standing as a commercial end-user of nonfinancial commodities (i.e., OTC commodity derivatives).

Moreover, as the last quotation suggests, the Chairperson's view of commercial end-user OTC commodity derivative activity as designed to "hedge commercial risks" can be seen as a reflection of a similar regulatory understanding that served as one of the bases for the CFTC's issuance of the trade option exemption in the final "Commodity Options" rule (see Chapter 9). The notion that at least some trading activity of OTC commodity derivatives could be categorized as 'commercial risk management' had been expressed

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[398] Forward Contracts With Embedded Volumetric Optionality, 79 Fed. Reg. 69076 (2014).

[399] See, for instance: Testimony of Chairman Timothy Massad before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Washington, DC, Chairman Timothy Massad, 9 September 2014. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opaomassad-1. Remarks of Timothy G. Massad at the CME Global Financial Leadership Conference, Chairman Timothy Massad, 18 November 2014. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-5. Remarks of Timothy G. Massad before the Coalition for Derivatives End-Users, Chairman Timothy Massad, 26 February 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-12.

already by agency regulations. Nonetheless, as conveyed in the previous section, around the time of Chair Massad's arrival at the Commission, Congress was clearly signaling that it interpreted these parties' activities as fundamentally serving a 'risk management' function. Given the Chairperson's above quoted understanding that Congress was directing the CFTC to provide a disparate regulatory structure for OTC commodity derivative commercial end-users, and Congress's overt attempts to legislate to do just that, it is plausible that the Chair's articulated regulatory vision was solidified and legitimated in this environment. As the changes to the forward contract exclusion indicate, it can be assumed that Massad was effective in implementing his policy preference for those entities which, in his view, were not responsible for the financial crisis (i.e., commercial end-users of OTC commodity derivatives) from bearing the full weight of the Dodd-Frank reforms; thereby establishing a regulatory approach towards forward contracts that was seemingly more palatable to commercial end-users.

Turning now to those external semiotic influences on CFTC policymakers' revisions to the forward contract exclusion. Here, the communications of interested parties must be considered. Prior to the release of the "Proposed Guidance," and in addition to the comment period immediately succeeding the agency's 2012 publication of the exclusion in the final "Further Definitions" rule, the Commission afforded outside parties the opportunity to provide their perspectives on volumetric optionality through an April 2014 "end-users issues" public roundtable meeting, and a corresponding solicitation for comments on this gathering. The predominant perspective expressed by regulatees and their representatives at each of these three junctures was that the seventh element of the 7-part test should either be deleted or clarified. For instance, in its 2012 comment letter, ConocoPhillips, an integrated petroleum company, intimated that "Part 7 should not be included in this test."[400] Furthermore, in its 2014 comment letter, Plains All American Pipeline, a petroleum transportation and storage company, stated that while it preferred that the agency delete the seventh element, it would be amenable to a more commercial end-user-friendly modification of this element's criteria.[401]

This view was typically justified by industry commenters' argument that the seventh element of the 7-part test created regulatory uncertainty surrounding which OTC commodity derivative contracts could be treated as excluded forwards, and which as regulatable swaps. As argued by the American Petroleum Institute, a petroleum industry-centric trade group, this element of the test was "vague and unworkable" and did not account for the "complex motivations for exercising volumetric optionality."[402] Moreover, industry-related commenters posited that this uncertainty imposed substantial costs (e.g., from compliance, protracted contract negotiations and due diligence, and occasionally from the loss of business) on commercial end-users. For example, the Edison Electric Institute and the Electric Power Supply Association, and electric company trade group, indicated to the CFTC that the above depicted uncertainty "increase[d] transaction costs" for its members and "for consumers," affected electricity supply contract negotiations, and, in some cases, caused "parties to walk away from transactions that would have served a

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[400] Letter from Janet Kelly, ConocoPhillips Company, 23 August 2012, at 4. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58427&SearchText=. For the same request, see also: Letter from Robert Pickel, International Swaps and Derivatives Association (ISDA), 12 October 2012. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58889&SearchText=.
[401] Letter from Sweta Sethna, Plains All American Pipeline, L.P., 17 April 2014, at 4. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59824&SearchText=. See the following for a similarly expressed opinion: Letter from David McIndoe, Sutherland Asbill & Brennan, L.L.P., on behalf of The Commercial Energy Working Group, 17 April 2014; and Letter from David Perlman, Bracewell & Giuliani, on behalf of the Coalition of Physical Energy Companies, 17 April 2014. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1485&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_20.
[402] Letter from Shane Skelton, American Petroleum Institute, 11 October 2012, at 4. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58868&SearchText=.

legitimate commercial purpose."[403] Thus, from these commenters' standpoint, an elimination or an amenable clarification of the seventh element would serve to mollify what they viewed as relevant concerns.

Those entities requesting a revision of the 7-part test and its corresponding interpretive guidance in connection with the 2012 comment period, and the 2014 roundtable meeting, comprised a variety of OTC commodity derivative users and trade groups. These included individual natural gas transportation companies (e.g., Atmos Energy Holdings, Inc.), electricity providers (e.g., Portland General Electric Company and Southern California Edison Company), major integrated petroleum firms (e.g., ConocoPhillips), and both industry consortiums representing amalgamations of commercial end-users – such as the Interstate Natural Gas Association of America and the Coalition of Physical Energy Companies – and consortiums representing general OTC derivative interests – such as the International Swaps and Derivatives Association (ISDA).[404] The common thread tying these commenters and meeting participants together was that they were routinely involved in, or represented interests directly engaged in, the utilization of deliverable OTC commodity derivatives containing volumetric options. Financial entities, such as banks, neither participated in the aforementioned comment periods nor in the roundtable meeting.[405]

As explored in the pages that follow, many of the changes made to the interpretive guidance on volumetric optionality correspond with the content of participating parties'

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[403] Letter from Lopa Parikh, Edison Electric Institute and Electric Power Supply Association, 17 April 2014, at 3. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59816&SearchText=.
[404] For comment letters to the 2012 final "Further Definitions" rule, see: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1256&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=2_50. For comment letters on the 2014 meeting, see: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1485&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_20.
[405] Ibid. See the comment files.

comment letters. This provides evidence of an intertextual (and interdiscursive) relationship between the "Proposed Guidance" and the "Final Guidance" and much of the material formally submitted to the CFTC by commercial end-users of OTC commodity derivatives and their representatives. Additionally, this indicates a fruitful exercise of commercial end-users' (and their representatives') instrumental power. Evidence of this appears in that Commission policymakers gave deference to these commenters' representations and arguments and, in some cases, even relied on the content of these comments to directly inform aspects of CFTC interpretive guidance. Moreover, the extensive utilization of this content in the formulation of the guidance in its proposed and final forms might suggest that these rulemaking efforts were subject to capture by the regulatees; whereby CFTC officials utilized the information provided by, in this case, commercial end-users and their representatives, to ease perceived regulatory burdens on these OTC commodity derivative participants. Nevertheless, given Commission leadership's directive to address the concerns of these commodity industry parties, the presence of regulatee capture manifests itself as an intentional by-product. After all, under Chairman Massad, the CFTC was committed to revisiting the matter of forward contracts with embedded volumetric optionality from the standpoint of making this part of the forward contract exclusion amenable to commercial end-users. In the end, its use of the solutions proffered by those entities appears to have simply coincided with CFTC thinking as directed by the Chair.

Examples of the strength of industry's voice include the amended seventh element of the 7-part test reflecting the views articulated by the Commodity Markets Council (an industry trade group) and Plains All American Pipeline. In the estimation of both these entities, to be eligible for forward contract exclusion, this element should allow for facts and circumstances that may be within an end-user's control, and which may impact the volume of commodity delivered.[406] Another example is the permission discussed in the above sub-section for a party to rely on its counterparty's representations as to an OTC commodity derivative agreement satisfying the elements of the 7-part test. In allowing for this, the Commission appropriated industry practice, wherein parties give representations concerning a transaction satisfying the 7-part test. These representations often appear in a 'Representations and Reporting Amending Agreement', included as a codicil and used to contractually represent that a transaction meets the seven parts of the exclusion test.[407] Similarly, a final illustration involves EDF Trading North America (an energy marketing company). It requested that parties not be required to conduct due diligence on such representations, and such an approach was accepted and included in the CFTC's "Final Guidance."[408]

It should be noted, however, that one non-industry public interest group, Better Markets, commented in support of, and suggested no modifications to, the CFTC's 2012 final "Further Definitions" guidance concerning volumetric optionality (which, as reviewed above, was codified during Gensler's tenure as agency Chair).[409] In its 2012 comment letter, Better Markets argued that the 7-part test, as presented in and discussed above in Chapter 9, with its requirement that volumetric optionality be exercised due primarily to factors outside of a party's control, "adequately" ensured that a "narrow" forward contract

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[406] Letter from Ryan Barry, Commodity Markets Council, National Corn Growers Association, and Natural Gas Supply Association, 17 April 2014, at 3 and Letter from Sweta Sethna, Plains All American Pipeline, L.P., 17 April 2014, at 4. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1485&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=2_20.
[407] See Letter from Arushi Sharma, American Gas Association, 17 April 2014, at 7. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59821&SearchText=.
[408] Letter from Paige J. Lockett, EDF Trading North America, LLC, 22 December 2014, at 22f. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60094&SearchText=.
[409] See Letter from Dennis Kelleher, Better Markets, 12 October 2012. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58896&SearchText=.

exclusion was "faithfully implemented" as the language of Dodd-Frank Act intended.[410] Nevertheless, in commenting on the "Proposed Guidance," which broadened the qualifying criteria for this exclusion, Better Markets argued that this proposed expansion was "reminiscent of the infamous 'Enron Loophole'" (discussed in Chapter 6) in that by expanding such criteria and, thus, potentially excluding a growing number of OTC commodity derivatives from all regulatory oversight,[411] including the Commission's anti-fraud and anti-manipulation protections, the agency "inappropriately" enlarged the forward contract exclusion irrespective of its "statutory mandate to regulate swaps" and in contravention of its limited statutory authority under the Dodd-Frank Act to exclude forward contracts from swap regulations.[412]

Two additional non-industry advocacy groups – Public Citizen, and Americans for Financial Reform – similarly opposed changes made to the forward contract exclusion in the "Proposed Guidance." The central argument expressed by these two commenters was that broadening this exclusion would erroneously except from regulation derivative instruments that should be considered regulatable options (swaps), thus precluding CFTC oversight as required by Dodd-Frank.[413]

Nowhere in the "Final Guidance" did Commission policymakers address or utilize the perspectives of these three non-industry groups.[414] The text of this final release

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410 Ibid., at 4.
411 Recall that the act of excluding an object from regulation means that it is fully outside of an administrative agency's regulatory jurisdiction. Exempting an object from regulation, however, implies that it remains within an agency's purview, although the object is left mostly unregulated.
412 Letter from Dennis Kelleher, Better Markets, 22 December 2014. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60108&SearchText=.
413 See Letter from Bartlett Naylor, Public Citizen, 19 December 2014 and Letter from Marcus Stanley, Americans for Financial Reform, 22 December 2014. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1541&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=3_50.
414 See Forward Contracts With Embedded Volumetric Optionality, 80 Fed. Reg. 28239-44 (2015).

exclusively revolved around the commentary of commercial end-users or their representatives. Notwithstanding the three public interest groups' comments – which indirectly contested those enunciated by industry interests – the agency amended its interpretive guidance on forwards with volumetric optionality in favor of an expanded forward contract exclusion that could be more readily accessed by end-users and commercial market participants.[415] This implies that Commission officials intentionally granted commercial end-users and their representatives hegemony in terms of discursively conditioning the content of the ultimate revisions to the forward contract exclusion; an intention which stemmed from agency leadership's desire to revise the forward contract exclusion from the point-of-view of commercial end-users. Additionally, the inability of the aforementioned non-industry groups to similarly influence the amended exclusion indicates that, contrary to the findings of Ziegler and Woolley (2016) (see Chapter 3), members of these authors' self-styled 'stability alliance' were ineffective in thwarting industry's influential position during this terminal rulemaking sequence.

The internal and external (industry-related) semiotic influences reviewed above can, from the viewpoint of the CPE framework, be understood as the contributing discursive factors enabling CFTC policymakers' selection of the agency's modified regulatory treatment of embedded volumetric optionality in the forward contract exclusion. From a broad standpoint of semiosis, the rule revision and end-user deferential discourse advanced by incoming Commission leadership in 2014, including Chairperson Massad, and the

[415] In comment letters to the "Proposed Guidance," commodity industry commenters expressed their general approval of the changes to the forward contract exclusion and its regulatory treatment of forwards contracts containing volumetric optionality. See, for instance: Letter from Lisa Jacobson, Business Council for Sustainable Energy, 22 December 2014; Letter from Ryan Barry, National Corn Growers Association & National Gas Supply Association, 22 December 2014; and Letter from Stephen O'Connor, International Swaps and Derivatives Association, 22 December 2014. Each available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1541&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_50.

comment letters and other meaningful communications of end-users and commercial parties – which had been provided to the agency as this regulatory matter remained open – created a symbiotic discursive environment. In that environment, the CFTC could legitimate a process of reinterpretation and use the perspectives of end-users to inform its "Proposed Guidance" and "Final Guidance" on volumetric optionality. As stated in the preceding sub-section of this chapter, the outgrowth of this guidance was a more commodity industry-friendly forward contract exclusion.

Furthermore, the amended forward contract exclusion reflects an assumption by Commission policymakers of an understanding of the regulatability of forward contracts containing volumetric options. This assumption was semiotically informed by the internal discourses of incoming CFTC leadership and the interests of regulatees and their representatives as formally expressed through comment letters. Although regulatee interests were, as indicated above, contested during rulemaking interludes by the communications of non-industry advocacy groups, the discourses articulated by these groups failed to guide the Commission's selected regulatory approach. Rather, commercial market participants and end-users, whose perspectives on the forward contract exclusion were expressly sought and whose concerns were intently subject to remedying, found favorable reception by a CFTC actively seeking to recast its Dodd-Frank era OTC commodity derivative regulations to be more palatable to industry. These findings corroborate those of Yackee and Yackee (2006), in that industry – specifically, OTC commodity derivative commercial end-users and their representatives – successfully attained a desired final regulatory outcome by virtue of the discursive influence of its comment letters. Nevertheless, the caveat to this that must be kept in-mind is that industry interests were pushing on an open door, since the Commission, under the leadership of Chairperson

Massad, saw its mission as facilitating industry palatable revisions of the forward contract exclusion.

The influence of semiotic factors on the CFTC's reinterpretation of its guidance on forward contracts with embedded volumetric optionality must also be analyzed alongside those extra-semiotic variables with which they interacted and co-evolved. Drawing on CPE's notion of structuration, these variables can be discussed through the lenses of the four selectivities: structural, agential, technological, and discursive. Exploring the extra-semiotic provides further insight into those factors which enabled the above discussed discursive influences to condition agency policymakers' revision of the forward contract exclusion and, thus, their selection and retention of a new regulatory approach for OTC commodity derivatives containing volumetric optionality.

Viewing the "Proposed Guidance" and "Final Guidance" rule-makings through the lens of the structural selectivity reveals three significant impacts of the extra-semiotic. First, as stated earlier, by leaving open the interpretive guidance on forward contracts with embedded volumetric optionality in the final "Further Definitions" rule, a structural opportunity existed for Commission policymakers to permissibly amend this interpretation through future guidance. Second, the changing composition of leadership at the CFTC – including a new chairperson and commissioners – introduced fluidity into the regulatory mission of the agency and facilitated its change in direction. When the "Final Guidance" was adopted by the Commission, only one commissioner – Mark Wetjen – who was involved in rule-making for the "Further Definitions" rule remained a member of the CFTC. Notwithstanding Wetjen, the two new commissioners and Chairperson Massad opened the Commission to and guided it towards, as alluded to above, a regulatory agenda aimed at reducing perceived burdens on commercial end-users of OTC commodity derivatives. Third, the attempts by Congress to amend the Dodd-Frank Act (through amending the Commodity Exchange Act), and thereby statutorily address the concerns of commercial end-users of OTC commodity derivatives, is also a noteworthy structural consideration because such action plausibly signaled to the agency that an opportunity existed for the CFTC to recast its forward contract exclusion interpretive guidance. The congressional action indicated that the scope of Dodd-Frank was open to further interpretation irrespective of Congress's ability to enact new legislation.

Along these lines, the ability of policymakers, particularly Massad, to direct the CFTC towards this regulatory mission serves as an example of their (and his) power to influence events as seen through the agential selectivity. Especially in the case of Chair Massad, his influential post within the Commission as its leader afforded him a position from which to set and guide the agency's agenda of revising those regulations affecting end-users and commercial parties – such as the forward contract exclusion. It is worth noting that, although former Chairperson Gensler expressed a degree of openness to the concerns of OTC commodity derivative end-users (see Chapter 9), Massad's stance on this matter went beyond in that one of his main goals as Chair was to have CFTC policymakers review the agency's rules and interpretations that affected commercial end-user regulatees. The objective was to ensure a regulatory regime that accommodated such regulatees' interests.[416] As indicated in an interview with one former Commission official, the regulatory vision of the Chairperson is of preeminent significance in setting and guiding

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[416] See, for instance: Remarks of Timothy G. Massad before the Coalition for Derivative End-Users, Chairperson Timothy Massad, 26 February 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-12; Remarks of Chairman Timothy Massad before the National Energy Marketers Association, Chairperson Timothy Massad, 30 April 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-18; Remarks of Chairman Timothy Massad before the Energy Risk Summit USA 2015, Chairperson Timothy Massad, 12 May 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-21.

the CFTC's rulemaking agenda: "Everything is who's running the agency […] By the Administrative Procedure Act, every comment – material comment – needs to be answered. So, you can answer them all, but the end-product is, 'Where does the Commission want to be?'" (Interview, 6 October 2017, Washington, D.C.). In the instances of the "Proposed Guidance" and the "Final Guidance," the place where Chair Massad wanted the agency to be (as supported by the other agency commissioners) was the performance of a systematic review of regulations affecting OTC commodity derivative commercial end-users, such as the forward contract exclusion, all towards the goal of addressing the concerns voiced by these entities.

Seen through the technological selectivity, policymakers' ability to revise the forward contract exclusion to remedy regulatee concerns was supported by the voluminous intellectual resources supplied to CFTC by end-users, and entities representing their interests, through comment letters and during external meetings occurring between the publication of the final "Further Definitions" rule in 2012 and the 2015 promulgation of the "Final Guidance." These readily available resources allowed Commission policymakers straightforward access to information that could be used to inform the content of the agency's reinterpreted guidance on volumetric optionality. Put simply, the CFTC had an abundance of intellectual resources at its disposal that its policymakers could utilize to advance the agency's adjusted regulatory mission through the construction of an amended forward contract exclusion.

Finally, in regard to the discursive selectivity, as many of the aforementioned intellectual resources were provided to the Commission in the form (genre) of comment letters – such as those submitted in connection with the final "Further Definitions" rule, the 2014 roundtable meeting, and the promulgation of the "Proposed Guidance" –

policymakers were afforded the opportunity to justifiably draw on the letters' contents when codifying the amended guidance. This is an important consideration because the rulemaking process, as discussed in Chapter 2, is one in which agency policymakers are obliged to respond to pertinent comment letters, and in this case of the forward exclusion, replying to regulatee comments could provide CFTC officials with justification for changing their guidance on this matter. Furthermore, given the new regulatory vision for commercial end-users articulated by Commission leadership – in particular, Chairperson Massad – such intimations can be seen as both opening an opportunity for commodity industry parties to influence the discursive constitution of the revised forward contract exclusion, while also precluding non-industry points of view from conditioning the exception's content. In this way, the discourses advanced by top CFTC officials (such as Massad) during the rulemaking sequence for the revised exclusion can be understood to have enforced the selection of industry-related comments in agency policymakers' recasting of the forward contract exclusion. Stated simply, for Commission policymakers to meet their newly established regulatory objective of alleviating perceived burdens on commercial end-users, they had to rely on the comments (and general communications) of these OTC commodity derivative marketplace participants and their representatives which expressed alternative and less burdensome ways of regulating relevant trading activities.

In summary, the new regulatory approach towards embedded volumetric optionality taken in the modified forward contract exclusion was influenced by interacting and co-evolving semiotic and extra-semiotic variables. The routinely expressed desire of regulatees for an expanded and more industry-friendly forward contract exclusion intersected with the arrival of new Commission leadership which advocated for a different, less stringent regulatory treatment of end-users of OTC commodity derivatives, and which, under the direction of Chairperson Massad, intended to undertake a revision of regulations affecting these same parties. Thus, a synchronicity of interests between regulatees and the CFTC was produced whereby regulatory modifications favoring regulatees became a viable prospect. As Commission policymakers amended the forward contract exclusion, they used the formally submitted commentary of these regulatees to inform their modified interpretive guidance; that of non-industry, public advocacy groups, however, was not incorporated. The result being a broader exclusion which could be more easily accessed by OTC commodity derivative end-users and commercial market participants.

The foregoing findings can also shed light on the evolving nature of the Dodd-Frank imaginary. The relation between changes in CFTC policymakers' interpretation of volumetric optionality in the forward contract exclusion and the Dodd-Frank imaginary explored in previous chapters is essential to consider here. In Chapter 9, the argument was made that the Dodd-Frank imaginary was refined during final rule-making, but still retained its two-pronged form (i.e., emphasizing OTC marketplace transparency and reducing systemic risk); a form with which the exclusion of the final "Further Definitions" rule was compossible. By contrast, the concluding rulemaking events with which we are here concerned point to a significant evolution in the meaning of the Dodd-Frank Act to Commission officials; one which was necessary for the Dodd-Frank imaginary to maintain its compossibility with the revised forward contract exclusion. Rather than viewing the regulation of OTC commodity derivatives through an imaginary with two aspects, the agency's reinterpretation of the forward contract exclusion reveals that policymakers perceived their regulatory task as expanding to three considerations: promoting said transparency and mitigating systemic risk through regulation, provided that the activities of commercial end-users are (largely) excepted. Adopting this tripartite Dodd-Frank imaginary meant that CFTC policymakers could further reduce the complexity of their regulatory endeavors in the heterogeneous OTC commodity derivative marketplace by partitioning it and, then, (mostly) excluding the application of Dodd-Frank era swap regulations (i.e., the post-trading regulatory infrastructure) to commercial end-users.

It is also worth considering that this modified Dodd-Frank imaginary is the outgrowth of intentional utterances and acts of Commission policymakers subjected to, in the vocabulary of CPE, a process of variation, selection, and retention. In particular, this imaginary emerged from the above analyzed interplay of semiotic and extra-semiotic variables. The imaginary's prior two-pronged meaning was subject to contestation with the arrival of new CFTC leadership articulating a discourse of a different regulatory vision for OTC commodity derivatives, for which they had the ability and intention to carry out, and which found support in regulatee comment letters. Through the "Proposed Guidance" and the "Final Guidance" rule-makings, agency policymakers selected and then retained, respectively, a new imaginary through which they could view their regulation of forward contracts with embedded volumetric optionality (i.e., the forward contract exclusion). The emergence of a tripartite Dodd-Frank imaginary now meant that an OTC commodity derivative market participant's status as a commercial end-user took a step towards becoming the primary factor in determining the applicability of swap regulations to OTC commodity derivative transactions; with the final step being amending the trade option exemption.

Revisiting the Trade Option Exemption

A few months after publishing the final "Commodity Options" rule and its interim final rule for trade options, CFTC policymakers initially began revisiting the trade option exemption in a series of no-action letters. These letters, issued by the Commission's Division of Market Oversight, granted degrees of regulatory relief to trade option market participants. Between the promulgation of the final rule for commodity options in 2012 and the final

"Trade Options" rule in 2016, three no-action letters were issued by this agency division in connection with trade options.

Promulgated on August 14, 2012, the first of these releases allowed eligible trade options (i.e., those that met the exemption's 3-part test) to be transacted without compliance with the exemption's recordkeeping and reporting requirements.[417] This relief was granted to all trade option marketplace participants and was effective through the Division's next release.[418] On April 5, 2013, the Division of Market Oversight issued its second trade option-related no-action letter.[419] In it, the Division emphasized that the only reporting requirements which some non-swap dealers and non-major swap participants (e.g., commercial market participants and end-users) transacting trade options had were the annual filing of a Form TO (see Chapter 9) beginning in 2014, and the prompt notification of the Division via email if, at any point in the calendar year, they entered into an aggregate of $1 billion worth of trade options.[420] Specifically, these limited reporting requirements exclusively extended to those non-swap dealers and non-major swap participants that were otherwise reporting unrelated swap activities in real-time.[421] The final no-action letter, published on February 18, 2016, affirmed the Division's April 2013

[417] CFTC No-Action Letter No. 12-06, 14 August 2012. Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/12-06.pdf.
[418] Ibid.
[419] CFTC No-Action Letter No. 13-08, 5 April 2013. Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/13-08.pdf.
[420] Ibid.
[421] As stated in the previous chapter, irrespective of its categorization as a swap dealer or major swap participant, if a party to a trade option was already reporting its swap activities in real-time, then its trade option activities would likewise have to be reported in such a manner. Through this no-action letter, if a non-swap dealer or non-major swap participant was engaged in reportable swap trading and trade option transactions, it would now only have to report the swaps in real-time, not the trade options.

release.[422] Moreover, in this last letter, the Division stated that non-swap dealers and non-major swap participants could forego their 2016 Form TO submission without threat of regulatory enforcement actions.[423]

Combined, the above three no-action letters reveal that within the CFTC, increasing emphasis was being placed on the nature of a party to a trade option agreement (i.e., whether or not it was a swap dealer or major swap participant) in the agency's assessment of the regulatory infrastructure applicable to such a contract. These changing conceptions were also evident in the Commission's ensuing revision of the trade option exemption. Through its proposed and final "Trade Options" rule, the CFTC reduced certain regulatory requirements with which non-swap dealers and non-major swap participants transacting trade options had had to comply.

The proposed "Trade Options" rule put forth four substantive modifications to the compliance structure of the final "Commodity Options" rule's trade option exemption. First, non-swap dealers and non-major swap participants that were reporting other swap trading activity in real-time would no longer have to report their trade options in that same manner (i.e., no real-time reporting of trade options).[424] Second, all Form TO reporting obligations were withdrawn for non-swap dealers and non-major swap participants, and the Form itself was deleted from the Commission's Part 32 commodity (trade) options regulation (i.e., no reporting of trade options through Form TO).[425] Third, non-swap dealers and non-major swap participants would be required to promptly notify the agency's Division of Market Oversight if they had or expected to enter into trade options having an "aggregate notional

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[422] CFTC No-Action Letter No. 16-10, 18 February 2016. Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/16-10.pdf.
[423] Ibid.
[424] Trade Options, 80 Fed. Reg. 26203 (2015).
[425] Ibid.

value in excess of $1 billion" over the course of a calendar year.[426] Fourth, non-swap dealers and non-major swap participants would only be required to "maintain full and complete records"[427] of their trade option activities – which could be accessed by the CFTC at its request – pursuant to the agency's Part 45 Dodd-Frank recordkeeping and reporting regulations, and to obtain (purchase) a 'legal entity identifier' number[428] which could be provided to a trade option counterparty that is a swap dealer or major swap participant.[429]

Through these changes to the trade option exemption, qualifying trade options transacted by non-swap dealers and non-major swap participants (e.g., commercial market participants and end-users) were effectively exempted from all significant Dodd-Frank recordkeeping and reporting requirements. Nevertheless, those trade option transactions by and between swap dealers and major swap participants (e.g., BP and Macquarie Energy) continued to be subject to the recordkeeping and reporting standards set out in the final "Commodity Options" rule and under the agency's Part 45 Dodd-Frank regulations. The commissioners of the CFTC accepted the proposed "Trade Options" rule by a vote of four to zero and subjected it to a 30-day comment period.[430]

In the final version of the "Trade Options" rule, the Commission finalized its proposals to not require that non-swap dealers and non-major swap participants real-time report their trade options and to delete Form TO and all corresponding reporting requirements.[431] The final "Trade Options" rule, however, withdrew the $1 billion trade

[426] Ibid., at 26203f.
[427] Ibid., at 26203.
[428] A company-specific unique identification number required by the Dodd-Frank Act for those entities transacting swaps. See Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2160 (2012).
[429] Trade Options, 80 Fed. Reg. 26204 (2015).
[430] Ibid., at 26209.
[431] Trade Options, 81 Fed. Reg. 14969 (2016).

option notification proposal.[432] Thus, the reporting of any trade option data or information by non-swap dealers and non-major swap participants was not required; only those entities qualifying as swap dealers or major swap participants would be responsible for any reporting pursuant to the agency's Dodd-Frank reporting structure (e.g., the Commission's Part 45 regulations). Finally, the rule modified part of the proposed recordkeeping requirements for non-swap dealers and non-major swap participants. Although the final "Trade Options" rule still required that such entities attain and provide a 'legal entity identifier' number, it deleted any reference to Part 45 recordkeeping requirements for this class of parties, and specified that they would only need to maintain records of trade option activities as done "in the ordinary course of business."[433]

The final rule for the trade option exemption was similarly approved by the CFTC by a unanimous four to zero vote.[434] Its promulgation marked the terminal event in Dodd-Frank commodity and trade options rulemaking. In summary, through the final "Trade Options" rule, Commission policymakers eliminated and reduced reporting and recordkeeping requirements, respectively, for trade options transacted by non-swap dealers and non-major swap participants; effectively exempting these transactions by such parties from direct compliance with swap regulations (i.e., the Act's post-trading regulatory infrastructure).

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[432] Ibid., at 14969f.
[433] Ibid., at 14970f. While the term "ordinary course of business" is not defined in the rule's text, it can be assumed that this means document retention as compliant with a company's internal records retention policy. It should be noted, however, that some firms may not have such a written policy and may retain records in their ordinary course of business in an *ad hoc*, non-standardized manner.
[434] Ibid., at 14974.

Analyzing the Trade Option Exemption

Before assessing CFTC policymakers' construction of the revised trade option exemption, it is worth briefly commenting on the Division of Market Oversight's issuance of no-action letters. The regulatory relief granted through these letters was done in response to external communications with regulatees separate from comment periods relating to either the rules for commodity options or those for trade options. As an agency official indicated, in the case of the trade option exemption, the no-actions were promulgated because certain marketplace participants – non-swap dealers and non-major swap participants – were unable to comply with Dodd-Frank trade option reporting requirements:

> […] the no-action letters came after the rule is final and people said, "Wait a minute, this doesn't make sense, we can't do it, or we can't do it in the time frame you're saying." So, that would be in a meeting, people would come in up in arms, "How in the heck are we supposed to do this?" The industry would get together, or you would get individuals coming in and saying, "You know, I can't comply with this part of the reporting rules" [...] (Interview, 3 October 2017, Washington, D.C.)

This evidences that within the CFTC – the Division of Market Oversight, specifically – there was an awareness that compliance with the trade options regulatory scheme of the final "Commodity Options" rule was ostensibly proving impractical for those entities for whom the no-action relief was given: non-swap dealer and non-major swap participant commercial end-users. Moreover, it depicts a Commission whose policymakers were both considering the nature of a trade option party as an important variable in determining the applicability of Dodd-Frank swap regulations to related transactions, and who were addressing, in part, some of the concerns of these entities. Through rulemaking, this consideration of a party's status as a non-swap dealer and non-major swap participant would, for reasons analyzed below, principally underpin the changes to the regulation of trade options. The issuance of no-action relief also indicates that the regulatory approach taken by agency officials in the interim final rule for trade options in the final “Commodity Options” rule was – to use the language of CPE – not yet sedimented. From soon after its adoption by the Commission, the viability of this interim final trade option exemption was being contested internally by the Division of Market Oversight through its communications with regulatees, and in this regard the exemption was subject to variation, with the potential existing for a new treatment of trade options to emerge.

Turning to an analysis of the revised trade option exemption, two aspects are essential to assess in order to understand how agency policymakers constructed their revisions to this exemption and, thus, their regulatory approach towards trade option. First, as the CPE theoretical framework demands, an exploration of the semiotic and extra-semiotic influences on CFTC policymakers’ recasting of trade option exemption. And second, an examination of what the alterations to the exemption mean for the modified Dodd-Frank imaginary. As the proposed and final “Trade Options” rule-makings occurred within the same immediate context as the earlier analyzed reinterpretation of the forward contract exclusion, the first item’s analysis engages with many of those influences previously discussed. Similarly, the examination of the exemption and the Dodd-Frank imaginary expands on several of the analytical themes already presented above in the exploration of the analogous topic.

To begin, it should be noted that, as was the case with the forward contract exclusion, the ’interim final’ rule designation for trade options (i.e., its textual genre) also provided interested parties with an opportunity to comment. Thus, prior to the issuance of the proposed “Trade Options” rule, the matter of the Commission’s treatment of trade options within the Dodd-Frank regulatory framework was likewise left open and, when coupled with the effects of the no-action letters discussed above, an opening was again in place (as viewed through the lens of CPE's discursive selectivity) for the rulemaking process to return to a stage of variation through external (e.g., comment letters) and internal (e.g., the no-action letters of the Division of Market Oversight) discursive contestation. Outside parties took advantage of this opportunity to influence the agency to revise the trade option exemption by submitting 11 letters to the CFTC immediately following the publication of the interim final trade option exemption in the final "Commodity Options" rule.[435] Ten of these comment letters were from trade groups representing commodity industry interests, and one was from an individual commodity trader; however, neither commodity companies (e.g., a natural gas producer) nor non-industry advocacy groups (e.g., Better Markets) commented on the interim final trade option exemption.[436] Of the comment letters received, several suggested that the Commission either not treat trade options as swaps[437] or that the agency generally reduce reporting requirements by allowing all trade options transacted by non-swap dealers and non-major swap participants to be reported yearly on Form TO.[438] Only one comment letter asked for yearly reporting Form TO to be discarded.[439]

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[435] See comment file, after 27 April 2012: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1196&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_50.

[436] Ibid.

[437] See, for instance: Letter from David Perlman, Bracewell & Giuliani, on behalf of the Coalition of Physical Energy Companies, 7 June 2012; Letter from Craig G. Goodman, National Energy Marketers Association, 26 June 2012; and Letter from Andrew K. Soto, American Gas Association, 26 June 2012. Each available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1196&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_50.

[438] See, for instance: Letter from Michael Sweeney, Sutherland Asbill & Brennan, L.L.P., on behalf of the Commercial Energy Working Group, 26 June 2012 and Letter from Lopa Parikh, Edison Electric Institute, 26 June 2012. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1196&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=2_50.

[439] Letter from Phillip Lookadoo, International Energy Credit Association, 26 June 2012, at 2. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58269&SearchText=.

These comments did not, however, induce CFTC policymakers to revisit, through rulemaking, the interim final trade option exemption. The same can be said of those comments solicited by the agency in a December 2012 public request for further perspective on reporting Form TO; comments which, made exclusively by industry trade groups, essentially recited the positions previously expressed during the earlier 2012 comment period for the interim final rule on trade options.[440] It was not until after the arrival of new Commission leadership that, as with the forward contract exclusion, revisions to the trade option exemption, through rulemaking, were initiated. This indicates that the comment letters of commercial end-users and groups representing their interests were, on their own, insufficient to prompt CFTC policymakers to formally revise the trade option exemption. Essentially, the agency acquitted itself as not beholden to its regulatees. In order for that sort of path to be trod, an additional variable was necessary: an articulated and implemented regulatory agenda seeking to accommodate the suggestions of OTC commodity derivate commercial end-users and groups representing the interests of those end-users.

As such, it is vital to note another similarity with the above analyzed revised forward contract exclusion. Namely, the modifications to the trade option exemption, through the proposed and final "Trade Options" rule-makings, were made in the same institutional context wherein CFTC leadership – and Chair Massad in particular – explicitly advocated for a regulatory approach to OTC commodity derivatives which both differentiated commercial end-users from other parties, and sought to address the concerns of such marketplace participants through further rulemaking. Because a trade option, by definition, is transacted by at least one commercial entity, the review of this

[440] See comment file: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1305.

derivative instrument's regulation was, therefore, a part of the emendation program advanced by Chairperson Massad:

> In sum, we have been very focused on fine-tuning the rules to make sure they work for commercial end-users, and we will continue to do so. For example, I know several of your companies are working on submitting Form TO to report trade option positions […] I've asked the CFTC staff to look at the usefulness of this information and we will consider changes to reduce the reporting currently required for trade options.[441]

From the standpoint of semiosis, the changes made to the trade option exemption in the proposed and final "Trade Options" rules broadly reflect the influence of Massad's articulated position on reducing perceived regulatory burdens for commercial end-users in conjunction with the perspectives of regulatees and their representatives exercising instrumental (lobbying) power. For example, the deletion of Form TO – the effect of which was to relieve non-swap dealers and non-major swap participants from all yearly reporting requirements relating to their trade option activities – emerged as a response to regulatees (and their representatives) communicating to the CFTC their experience with the (apparent) high cost of Form TO compliance.[442] The discourse advanced by Chairperson Massad, which communicated an intention to mollify the concerns of commercial end-users, and to "consider" reducing trade option reporting obligations, intersected with the perspectives of these OTC commodity derivative marketplace participants.

Another example is the new exemption's elimination of the need for any non-swap dealer or non-major swap participant to report trade option transactions in real-time. This can first be seen as the codification in the genre of a textual rule (i.e., recontextualization)

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[441] Remarks of Timothy G. Massad before the Coalition for Derivative End-Users, Chairperson Timothy Massad, 26 February 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-12.

[442] See Trade Options, 80 Fed. Reg. 26203 (2015).

with the Division of Market Oversight's April 2013 no-action letter granting similar relief, an action taken to accommodate the ostensible inability of some non-swap dealers and non-major swap participants to comply with the trade option exemption's real-time reporting requirement. It can also be viewed as an outgrowth of commodity industry parties' comment letter requests that trade options not be required to be reported in real-time[443] given (at the direction of Chair Massad) the Commission's intended end-user focused rule revisions.

Two other instances of commercial end-users and their representatives exercising, through formally submitted comment letters, instrumental power to affect the trade option exemption include the final "Trade Options" rule's withdrawal of the proposed $1 billion trade option notification scheme, and its limited trade option recordkeeping requirements for non-swap dealers and non-major swap participants. In regard to the former, Commission policymakers explicitly adopted the perspective of the self-described Electric Association, an electric power consortium comprising five regional electricity supply associations. That group asked that CFTC officials fully delete the $1 billion notification scheme.[444] The justifications for this position given by the Electric Association – which were subsequently appropriated by CFTC policymakers as part of their own justifications for eliminating the requirement[445] – were that the scheme could possibly impose significant costs on non-swap dealers and non-major swap participants, and that the data and

[443] See, for instance: Letter from Diane Moody, American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Power Institute, and Electric Power Supply Association, 15 February 2013, at 7f and Letter from David Perlman, Bracewell & Giuliani, on behalf of the Coalition of Physical Energy Companies, 15 February 2013, at 2f. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1305.
[444] See Trade Options, 81 Fed. Reg. 14970. (2016) and Letter from Russell Wasson, American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, and National Rural Electric Cooperative Association, 19 June 2015, at 3. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60437&SearchText=.
[445] See Trade Options, 81 Fed. Reg. 14970 (2016).

information collected therefrom would not provide “any meaningful regulatory benefits” to the Commission’s mission of increasing OTC market transparency.[446] To the latter, the final “Trade Options” rule’s limitation of recordkeeping requirements to transactions done in the “ordinary course” of a non-swap dealer’s or non-major swap participant’s business represents a recitation of the views expressed in comment letters of the aforementioned electric consortium and Southern Company Services (an electric power conglomerate).[447] This stands in contrast to the “full and complete records” obligation of the proposed “Trade Options” rule, and the even more stringent partial Part 45 compliance of the final “Commodity Options” rule. In accepting this recordkeeping standard, CFTC policymakers reasoned that – as similarly argued by the commenters[448] – a limited standard would reduce costs to non-swap dealers and non-major swap participants.[449]

Stemming from this, it can be surmised that the contributing semiotic influences on the selection of a revised trade option exemption were the stated regulatory agenda of Commission leadership, and the comment letters of relevant parties and their representatives. Where these contributing influences intersected, and where the comment letters provided intellectual resources that agency policymakers could use to rationalize carrying out their new regulatory vision, the new trade option exemption naturally reflected the interests of industry. (Of note, countervailing perspectives were not formally available to CFTC officials in the comment file, as no non-industry, public advocacy groups

[446] Letter from Russell Wasson, American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, and National Rural Electric Cooperative Association, 19 June 2015, at 4.
[447] Letter from Paul Hughes, Southern Company Services, Inc., 22 June 2015, at 4f and Letter from Russell Wasson, American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, and National Rural Electric Cooperative Association, 19 June 2015, at 13f. Both available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1580&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_20.
[448] Ibid.
[449] See Trade Options, 81 Fed. Reg. 14971 (2016).

commented on any trade option-related solicitations.[450] And further, as suggested by McKay and Yackee (2007), and as reviewed in Chapter 3, commenting groups forming a dominant proportion of a rule's comment file and advancing the same or similar objectives can influence policymakers to respond positively to their requests.)

The above analysis shows that the changes to the trade option exemption made in the proposed and final "Trade Options" rules came directly from the comment letters of commercial end-users (and non-swap dealers or non-major swap participants) of OTC commodity derivatives and their representative trade groups. This evidences an intertextual (and interdiscursive) relationship between the content of the CFTC's regulations and the observations offered in these entities' comment letters. It should be specified again, however, that although interested parties provided the Commission with comments on several occasions between the agency's 2012 publication of the final "Commodity Options" rule, and the 2016 issuance of the final "Trade Options" rule, it was not until Chairperson Massad instructed Commission policymakers to re-examine the trade option exemption that such comment letters were able to tangibly inform the nature of a new exemption. Similar to the forward contract exclusion, this ostensibly implies that under Massad's leadership, trade options rule-making was subject to capture by regulatees. Nevertheless, the same caveat that was made in the above analysis of the revised forward contract exclusion can likewise be made in relation to the proposed and final "Trade Options" rules. Namely, that this deference to industry commentary was intentional, and directed by the Chair so as to allay the concerns expressed by OTC commodity derivative

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[450] See comment files. For that on the interim final trade options rule, see: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1196. For the December 2012 Form TO comment request, see: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1305. For the proposed "Trade Options" rule, see: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1580&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_20.

end-users regarding their perception of burdensome regulations. This phenomenon corroborates the notion in the literature review of Chapter 3 – e.g., Yackee and Yackee (2006) – that interested parties can achieve desirable final rulemaking outcomes through their provision of comment letters, and, when taken in conjunction with similar findings for forward contract exclusion rule-making, suggests that over the course of these rule-makings, a symbiotic relationship existed between Commission policymakers' (and their demand for intellectual resources to craft the Chairperson-directed rulemaking revisions) and regulatees (and their representatives) who supplied these officials with the textual content requisite to accomplish their regulatory mission.

The extra-semiotic considerations – as examined through the four selectivities posited by CPE – with which these semiotic influences interacted and co-evolved are nearly identical to those analyzed in the earlier discussion of the revised forward contract exclusion. Through the lens of the structural selectivity, the fact of leaving open the interim final rule on trade options, and the recomposition of CFTC leadership, both served to cultivate an environment wherein alterations to the trade option exemption, through rulemaking, could take place given the Commission's plenary authority in that realm. Furthermore, while the previous commodity (trade) options-related rule-makings were drafted within an Agricultural Swaps Rulemaking Team led by Don Heitman, the proposed and final "Trade Options" rule-making efforts were not done in this same structural context. In particular, the new rule-makings were undertaken separate from that agricultural team, by individuals who were not responsible for the previous commodity options rules.[451]

[451] As based on the 'For Further Information Contact' listings in the preface to the proposed and final "Trade Options" rules. See Trade Options, 80 Fed. Reg. 26200 (2015) and Trade Options, 81 Fed. Reg. 14966 (2016), respectively.

From the standpoint of the agential selectivity, as with the forward contract exclusion, Massad's ability as Chairperson to set the agency's regulatory agenda was again an essential factor in prompting and guiding the recasting of the trade option exemption. This agenda – informed by his regulatory vision – was one of modifying those OTC commodity derivative regulations that affected commercial end-users of these instruments. As such, Chair Massad directed the CFTC to revise the trade option exemption to be less burdensome to these same business entities, like through the elimination of required Form TO filing.[452]

With regard to the technological selectivity, a plethora of formal comment letters and other informal communications from regulatees and their representatives were already available. These could thus serve as intellectual resources on which Commission policymakers could draw as the Commission undertook exemption revisions in connection with the agency's reconceptualized regulatory mission. Finally, as it relates to the discursive selectivity, here again, CFTC policymakers were afforded the opportunity to justifiably utilize the commentary of interested party comment letters to modify the trade option exemption in their development of the proposed and final "Trade Options" rules. Nevertheless, unlike with the case of the revisited forward contract exclusion, no non-industry advocacy group commented on the matter of trade options at any of the rulemaking junctures discussed in this current chapter. Simply put, external intellectual resources concerning the regulation of trade options were exclusively provided by OTC commodity derivative industry interests.

[452] See: Remarks of Chairman Timothy Massad before the Natural Gas Roundtable (Washington, D.C.), Chairperson Timothy Massad, 26 May 2015. Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-23.

In summary, the foregoing CPE-backed analysis has shown that Commission policymakers' construction of the regulatory approach taken in the revised trade option exemption was conditioned by interacting and co-evolving semiotic and extra-semiotic factors. Guided by an amended regulatory mission articulated by new CFTC Chairperson Massad and other leadership, agency policymakers proceeded to revise the trade option exemption in a manner that sought to address the concerns expressed by commercial end-users. When rule-making, such officials relied on the commentary provided by these participants, or by those who represented their interests. That commentary informed the changes to the reporting and recordkeeping requirements of the trade option exemption. As a result of this process, the regulation of trade options notably pivoted to differentiating non-swap dealers and non-major swap participants from other entities, and to a position which favored the regulatory positions advocated by commercial end-users. Through the final form of the trade option exemption, commodity (trade) option transactions by non-swap dealers and non-major swap participants were exempted from compliance with essentially all Dodd-Frank swap regulations.

The revisions made to the trade option exemption further support the above argument concerning the evolving nature of the Dodd-Frank imaginary. As was the case with the modified forward contract exclusion, through trade option rulemaking, CFTC policymakers imparted to the Dodd-Frank imaginary a third lens through which to view their regulatory endeavors: exempting non-swap dealers and non-major swap participants (together, a subset of commercial end-users). This had the effect of freeing such entities from OTC commodity derivative regulations seeking to promote transparency and reduce systemic risk. The existing Dodd-Frank imaginary was subject to multiple sources of variation – most notably from the arrival of new Commission leadership which sought to revise OTC commodity derivative regulations affecting commercial end-users. Evidenced by the proposed and final "Trade Options" rule-makings, agency policymakers then selected and retained a modified, tripartite Dodd-Frank imaginary which was compossible with the CFTC's new regulatory vision, and which could reciprocally legitimate the agency's regulatory reforms. By adopting this Dodd-Frank imaginary, Commission policymakers reduced the complexity of their regulatory endeavors in the heterogeneous OTC commodity derivative marketplace through a differentiated application of Dodd-Frank swap regulations based on a participant's status as a non-swap dealer and non-major swap participant.

CONCLUDING REMARKS

Through the above CPE analyses of the revised forward contract exclusion and trade option exemption, this chapter has explored how CFTC policymakers constructed the regulation of OTC commodity derivatives during the course of these terminal rulemaking events. In the case of the reinterpreted forward contract exclusion, policymakers expanded the qualifying facts and circumstances that a commercial-end user could rely upon when assessing the fitness for exclusion of a forward contract with embedded volumetric optionality. With regards to the revisions to the trade option exemption, agency officials removed effectively all reporting and recordkeeping compliance requirements for those trade options transacted by non-swap dealers and non-major swap participants. As discussed throughout this chapter, the principal regulatory thrust in the domain of OTC commodity derivatives during this ultimate rulemaking period was to revise those regulations affecting commercial-end users, and to provide these parties with concomitant regulatory relief. When taken together, the amended forward contract exclusion and the trade option exemption allowed for commercial end-users – and for non-swap dealers and non-major swap participants in particular – to effectively transact their OTC commodity derivatives outside of the bounds of Dodd-Frank's post-trade regulatory infrastructure (i.e., its swap regulations).

Although the exclusion and exemption produced this result, it is worth noting that Commission policymakers did not express in their rule-makings for these regulations any consideration of redefining as non-swaps so-called "intended-to-be-delivered" OTC commodity derivatives containing optionality. Rather, these officials elected to continue treating all OTC commodity derivatives containing optionality as swaps – in accordance with their interpretation of the Dodd-Frank Act which defined a swap as, among other things, an "option of *any* kind" (emphasis added).[453] During rulemaking for the new forward contract exclusion and trade option exemption, several industry commenters asked that the CFTC not treat some derivatives containing optional commitments as swaps in the first sense[454]; the desired outcome being that an instrument's qualification for either the exclusion or exemption would be a superfluous aside. Nevertheless, Commission policymakers did not to select this approach and, thus, maintained their understanding of OTC commodity derivatives with embedded optionality as swaps in the first sense, notwithstanding the intended delivery of the exercised embedded option. This is significant because it illustrates that not all views expressed by industry commenters were accepted by CFTC officials. It also means that agency policymakers' conception of what resulted in an OTC commodity derivative being a swap (i.e., optionality) remained unchanged, irrespective of outside party

[453] See Commodity Exchange Act § 4, 7 U.S.C. § 1a(47) (2010).
[454] See, for instance: Letter from Amy Fisher, Cogen Technologies Linden Venture, L.P., 22 December 2014. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60092&SearchText=; Letter from Christina Crooks, National Association of Manufacturers, 28 January 2015. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60357&SearchText=; Letter from Paul Hughes, Southern Company Services, Inc., 22 June 2015. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60452&SearchText=; and Letter from Amy Fisher, Cogen Technologies Linden Venture, L.P., 22 June 2015. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60441&SearchText=.

contestation and an institutional shift towards promoting regulations allaying the concerns of commercial end-users. One possible explanation for the retention of this approach is that Commission officials viewed the equivalence of swaps with all forms of options as statutorily determined by the Dodd-Frank Act, thus preventing the notion's recasting through administrative agency rulemaking.[455] Nonetheless, since Dodd-Frank specified that transactions in nonfinancial commodities where physical settlement was intended were to be excepted from definition as swaps, CFTC policymakers then relied on this qualification as the basis for crafting the forward contract exclusion as a subsidiary exception to the statutorily mandated definition of a swap.

In regard to this project's CPE theoretical framework, the above analyses show that the process of constructing OTC commodity derivative regulations was one denoted by variation, selection, and retention. Variation arose from open comment periods on the issues of volumetric optionality and trade options, in addition to the arrival of new agency leadership which articulated and implemented an agenda of regulatory reform. The subsequent selection and retention of regulatory approaches towards forward contracts with embedded volumetric options and trade options were contingent on interacting and co-evolving semiotic and extra-semiotic influences. As such, the amended regulatory treatments of volumetric optionality and trade options were selected and retained because they were compossible with the pro-reform discourse of CFTC leadership (especially that of Chairperson Massad) subject to the constraints and opportunities afforded by the four selectivities as discussed above. Through this process, the Dodd-Frank imaginary was modified to reflect a new, tripartite understanding of the Dodd-Frank Act's meaning in relation to OTC commodity derivatives. That imaginary was one which differentiated the

[455] See Forward Contracts With Embedded Volumetric Optionality, 80 Fed. Reg. 28240 (2015).

application of the Act's swap regulations to OTC commodity derivatives as based on a party's status as a commercial end-user (and as a non-swap dealer or non-major swap participant).

CONCLUSION

Through a CPE-informed analysis of OTC commodity derivative rulemaking at the CFTC between 2010 and 2016, this research project has examined how Commission policymakers constructed the regulation of these derivative instruments. As chapters 7 through 10 show, during each of the demarcated junctures in the rulemaking process (i.e., advance notice of proposed rulemaking, proposed rulemaking, final rulemaking, and the revisions to prior rulemaking), CFTC officials constructed their regulatory approaches to OTC commodity derivatives in slightly different ways. Those differing constructions were, in the vocabulary of CPE, influenced by the variable interaction and co-evolution of semiosis (semiotic factors) and structuration (extra-semiotic factors). Moreover, as rulemaking progressed, the Dodd-Frank imaginary, which served as the lens through which agency policymakers viewed their regulatory endeavors, itself evolved through the same dynamical changes to these intersecting influences. The Dodd-Frank imaginary that emerged at the terminus of rulemaking – and the one that, from the standpoint of CPE, was ultimately selected and retained by Commission policymakers – reflected the view that OTC commodity derivative transactions of commercial end-users[456] (particularly non-swap dealers and non-major swap participants) would be either largely excluded or exempted from Dodd-Frank Act swap regulations (i.e., its post-trade regulatory infrastructure).

From the perspective of the CFTC's historical experience with regulating OTC commodity derivatives (see Chapter 6) and the broader political economy, the analyzed rulemaking sequence has two significant implications. The first is that the agency's longstanding question as to which OTC commodity derivative would be regulated was

[456] As noted in Chapter 10, this term is used to denote both true end-users of nonfinancial commodities (i.e., energy and metals) as well as commercial marketplace participants/commercial parties who produce, process, or handle nonfinancial commodities.

resolved. Through the CFTC's forward contract exclusion and commodity (trade) options rulemaking, Commission policymakers defined, in the first instance, an OTC commodity derivative that would be regulated (i.e., a 'swap') as a contract for future delivery which contained optionality, principally relating to the intent to deliver the underlying asset referent, but also to the commodity's price and quantity. Nevertheless, and as expressed by their revised regulatory approach (see Chapter 10), ultimately, the extent to which OTC commodity derivatives would be regulated as 'swaps' was contingent on a transacting party's status as a commodity commercial end-user (predominantly unregulated), or as a non-commercial end-user (regulated). Thus, the OTC commodity derivative transactions of, for instance, a municipal tidal energy producer would generally be excepted or exempted from these regulations, whereas similar activities of systemically important financial institutions would not.

The other significant implication concerns the multi-year rulemaking sequence's meaning from the standpoint of its broader political economy. Across the arc of OTC commodity derivative rulemaking, the regulatory structure in-place at the end of 2016 for OTC commodity derivative market participants who were commercial end-users (and non-swap dealers and non-major swap participants) resembled the mostly unregulated OTC commodity derivative space that characterized the pre-Dodd-Frank period discussed in Chapter 6. While highly levered banks and other financial institutions were the primary facilitators of the instability which typified the OTC derivatives marketplace during the 2007/2008 financial crisis, as illuminated in Chapter 6, OTC commodity derivative commercial marketplace participants – such as Enron – had been at the core of other OTC derivative-related instability in the lead-up to that crisis. The Dodd-Frank Act sought to both bring transparency to OTC derivative markets and to reduce the systemic risk which emerged therefrom – thereby addressing problems central to the financial crisis and, in part, to the historical crises in OTC commodities trading. Despite this, the terminal OTC commodity derivative rulemaking events covered in Chapter 10 seemingly indicate that these goals would not apply to commercial, non-financial enterprises. Thus, OTC commodity derivative rulemaking between 2010 and 2016 arguably resulted in the perpetuation of a potentially crisis-prone regulatory regime, but one that beneficially (from the standpoint of costs and expenses) limited commercial end-users' need for regulatory compliance with the Dodd-Frank Act.

In the balance of the materials that follow, thoughts and observations on three particular items are put forward. First, through answering this project's guiding sub- and central research questions, a recapitulation of the basic findings revealed in the previous chapters is presented. Included therein is a discussion of the possible limitations associated with these findings. Second, the findings addressed are then used to comment and expand on applicable literature reviewed in Chapter 3, and to elucidate what this project contributes to the scholarly research on the CFTC's OTC derivative rulemaking, specifically, and on the process of administrative agency rulemaking, generally. And finally, a brief recitation of potential further research opportunities is offered.

ENGAGING THE RESEARCH QUESTIONS, REVIEWING THE FINDINGS, AND POSSIBLE LIMITATIONS

With specific regard to the four sub- and central questions, as well as with regard to the essential findings of this thesis, and the potential limitations generally faced by this project, the following comments are in order.

First among sub-research questions concerns the CPE-posited imaginaries present during rulemaking. As stated throughout the above analytical chapters, Commission officials viewed their regulatory endeavors through the lens of a Dodd-Frank imaginary whose applied meaning was to bring transparency to OTC derivative markets, and to reduce corresponding systemic risk. This imaginary emerged from the directives of the Dodd-Frank Act and was operationalized through the Commission's regulations of OTC (commodity) derivatives. Both the analyses of the proposed (Chapter 8) and final (Chapter 9) rule-makings indicate that this two-pronged Dodd-Frank imaginary served as a guide for policymakers as they constructed their approach to the regulation of OTC commodity derivatives. Nevertheless, as noted in the analysis of the revised rule-makings (Chapter 10), and as will be further elaborated on below, this initial Dodd-Frank imaginary was contested and evolved to take on a tripartite form whose meaning included the exclusion or exemption of OTC commodity derivative transactions of most commercial end-users from Dodd-Frank's transparency and systemic risk mitigation infrastructure.

The second sub-research question pertains to the regulatory considerations to which CFTC policymakers granted significance during rulemaking as they, in the vocabulary of CPE, developed 'construals', or their regulatory approaches. From the broad perspective of the entire rulemaking sequence, the main considerations to which policymakers granted significance when crafting their OTC commodity derivative regulations were the presence of optionality in the derivative instruments (thus, rendering them a swap per the Dodd-Frank Act); the nature of a party transacting an OTC commodity derivative (e.g. a commercial end-user, a swap dealer, etc.); the regulatory constraints and opportunities afforded by the overarching Dodd-Frank Act; the agency's existing regulatory precedent in the marketplace; the communications of outside parties (typically through comment letters); and, the Commission's regulatory mission or vision. Across the analyzed rulemaking events, each of these were, to varying degrees, significant to OTC commodity derivative rulemaking.

More specifically, the analyses of the preceding chapters show that within each rulemaking event, agency policymakers gave significance to particular subsets of these items. For instance, through the two advance notices of proposed rulemaking, the provision of commentary by outside parties concerning how the Dodd-Frank Act would affect existing OTC derivative regulations and how the Act should guide the development of new regulations (though not as it related to commodity and trade options) was overtly encouraged by policymakers, both in the notices themselves as well as in the external communications of Commission officials. During the development of the proposed rules, while comment letters of interested parties were considered by policymakers, officials primarily emphasized a narrow interpretation of the Dodd-Frank Act and agency precedent to inform and structure proposed regulations for those OTC commodity derivatives containing optionality (i.e., swaps); a path plausibly conditioned by Chair Gensler's expressed desire for proposed rule-makings to closely adhere to the Act, and a tendency by policymakers to recontextualize aspects of existing regulations into new domains to expediently perform their tasks. While the communications of outside parties were a significant consideration as CFTC policymakers crafted a nuanced approach in the final rules to treating optionality within forward contracts and deliverable commodity (trade) options, the Gensler-led rulemaking efforts reflected his regulatory vision in that policymakers still relied on the Dodd-Frank Act and agency precedent as a central source informing final regulations. In the end, the revised rulemaking period evidences that policymakers granted especial significance to the perspectives of commercial end-users and their representatives in response to the articulated regulatory vision of new Commission leadership, and, in particular, that of new Chairperson Massad. The outcome of these revisions was to transform the regulatory structure for OTC commodity derivatives to one in which the nature of the party transacting these instruments was of central importance.

The issue of why certain approaches to the regulation of OTC commodity derivatives were selected and retained, and what influenced this selection and retention, comprises the third sub-research question. CPE-informed analyses of the proposed, final, and revised rulemaking periods suggest that a regulatory approach was selected and retained by Commission policymakers in response to the interaction and co-evolution of extenuating influential semiotic and extra-semiotic factors. For instance, the selection of the proposed regulatory approaches to commodity (trade) options and the forward contract exclusion, as explored in Chapter 8, reflects policymakers' reliance on existing regulatory precedent and the language of the Dodd-Frank Act, especially in light of the relatively limited availability of outside party perspective on the subtleties of deliverable optionality embedded in forward contracts and commodity (trade) options. Moreover, as discussed in conjunction with CPE's agential selectivity, the proposed regulations were influenced by the regulatory vision (or policy preference) and actions of Chairperson Gensler who, in an effort to increase transparency and reduce the systemic risk of OTC commodity derivatives, articulated a narrow interpretation of the Dodd-Frank imaginary's meaning at this rulemaking juncture.

As the subsequent comment period made available more detailed commentary on the perceived effects of the proposed regulations, policymakers responded in their final rules (see Chapter 9) by opting to reinstate a trade option exemption, and by elaborating on their understanding of an 'intent to deliver' standard central to the final forward contract exclusion, as well as developing a 7-part test for forward contracts with embedded volumetric optionality. Together, these responses were conditioned by several factors that were identified through an exploration of CPE-posited semiosis and structuration. Included among the factors were a consistent message expressed by outside party commenters requesting a trade option exemption (as discussed through semiosis and the technological selectivity), interactions between intra-agency rulemaking groups (as discussed through the structural selectivity), the bounds afforded by the Dodd-Frank Act and the availability of existing agency regulatory precedent (as discussed through the discursive selectivity), and the influence of Chairperson Gensler who adjusted his position on the regulatory matters covered in the final rules after consulting with actors external to the CFTC (as discussed through the agential selectivity). This particular juncture in the rulemaking process had the effect of refining the Dodd-Frank imaginary, though the imaginary generally maintained its applied two-pronged meaning of increasing OTC marketplace transparency and reducing systemic risk. The revisions to the forward contract exclusion and the trade option exemption (see Chapter 10) were an outgrowth of an adjusted regulatory mission pronounced by new Commission leadership – especially new Chair Massad – that sought, through its (and, specifically, his) ability to both set the agency's regulatory agenda and to exercise discretion over regulations' content, to revisit regulations affecting commercial end-users of OTC commodity derivatives. This nascent vision – one which conveyed an interpretation of the Dodd-Frank imaginary different than that expressed by previous Chair Gensler – intersected with regulatees' oft-expressed desire for policymaker amenability towards revising OTC commodity derivative regulations in their (financial) favor, and the availability of intellectual resources (supplied through comment letters of regulatees and their representatives) necessary to inform the changes to regulations' content. Out of all this, the Dodd-Frank imaginary ultimately evolved.

Relating to this last rulemaking stage, the fourth sub-research question enquires into whether the Dodd-Frank imaginary changed over the course of OTC commodity derivative rulemaking and, if so, how. The answer to the "whether" part of this question can be stated as an affirmative. In the end, the Dodd-Frank imaginary transformed to assimilate a third condition from which CFTC policymakers viewed their regulatory endeavors: promoting transparency and mitigating systemic through regulation, provided the OTC commodity derivative activities of commercial end-users were either largely excluded or exempted.

With respect to the “how” part of this fourth question, the two-part Dodd-Frank imaginary was transformed through the CPE-posited process of variation, selection, and retention in response to the same interacting semiotic and extra-semiotic factors covered immediately above. Moreover, as explained in Chapter 4, notwithstanding an imaginary’s status as being sedimented, its continuation as such is dependent on the replication of its semiotic and extra-semiotic supports. Therefore, this two-pronged imaginary was unable to maintain its form in the revised rulemaking period, specifically due to the erosion of its supports caused by the presence of new influences. Chief among these was the arrival of Chairperson Timothy Massad, who articulated an adjusted regulatory mission of revising OTC commodity derivative regulations affecting commercial end-users – and who was endowed with the capacity and discretion to set and then carry out a rulemaking agenda to this end.

Through the findings of the analytical chapters of Part III, and the heretofore review of the sub-research questions, the answer to the central research question of how agency policymakers constructed the regulation of OTC commodity derivatives can now be summarized. The analyses of the proposed, final, and revised rule-makings, as informed by CPE, demonstrate that the construction of OTC commodity derivative regulations stemmed from an array of interacting and co-evolving semiotic and extra-semiotic factors (as reviewed above) which conditioned the variation, selection, and retention of these policymakers’ regulatory treatment of these same instruments. While the analyses of the proposed (Chapter 8) and final (Chapter 9) rulemaking reveal that Commission officials crafted regulations which approximately followed two central themes emerging from the Dodd-Frank Act itself – the promotion of OTC marketplace transparency and the reduction of associated systemic risk – the revised rulemaking events (Chapter 10) indicate a significant transformation in how Commission policymakers constructed the regulation of OTC commodity derivatives. This transformation meant that the reach of what would be regulated by the CFTC as a 'swap', and thus subject to the two Dodd-Frank themes listed above, was extended only to those marketplace participants who were non-commercial end-users (e.g., financial firms, swap dealers, and major swap participants). As highlighted by the disjuncture in the adopted regulatory approach that transpired between the final and revised rule-makings, and as can be gleaned from the earlier analyses of each rulemaking event, the directional course of OTC commodity derivative rulemaking followed closely the articulated interpretation of the Dodd-Frank Act's meaning (i.e., the Dodd-Frank imaginary) by the Commission's chairpersons. For Chair Gensler, it meant accepting no less than transparency into the OTC commodity derivative activities of all marketplace participants. For Chair Massad, the implementation of Dodd-Frank's transparency and systemic risk reduction protocols were not to affect commercial end-users of OTC commodity derivatives, whom he viewed as not responsible for the financial crisis which precipitated the enactment of the Dodd-Frank law (see Chapter 10).

Before turning to how this research contributes to existing scholarly literature, four limitations associated with this project should be noted. First, the relatively small number of policymaker interviews conducted could mean that potentially significant details concerning OTC commodity derivative rulemaking within the CFTC were missed. Although such details remain in the realm of 'unknown-unknowns', should they be in existence, they could impact the findings herein arrived at. Attempts were, however, made to contact additional interviewees for in-person or telephonic interviews, but to no avail. Second, the findings of this study could be sensitive to the data on which the analysis sampled. Nevertheless, to mitigate these potential limitations, the instant study has drawn on manifold rulemaking-related documentation and followed a consistent CPE-based analytical approach to the individual rulemaking cases so as to ensure its claims to internal validity. Furthermore, where unknowns exist, or where there is an absence of evidence in the utilized data, their hypothesized presence is made known.

The third potential limitation is that the eclectic methodological approach to operationalizing CPE in the context of administrative agency rulemaking may be perceived as having resulted in the above analyses privileging certain semiotic or extra-semiotic influences over others, and/or semiosis over structuration. To alleviate this potential concern, the analytical chapters have sought to explore *both* the semiotic and extra-semiotic dimensions of rulemaking, and how they intersected, in-detail. Finally, given that this research is structured as a single-unit case study that focuses on a subset of overall Dodd-Frank Act era rulemaking in a regulatory domain characterized by idiosyncrasies, fully generalizing its findings to other cases of Dodd-Frank rulemaking, and to the more general rulemaking literature, could, as alluded to in Chapter 5, be limited. In light of this, should any generalizations be made, any reference to this paper's findings must make abundantly clear that the results are situated within the specific context of OTC commodity derivative rulemaking at the Commission between 2010 and 2016.

RETURNING TO THE EXISTING LITERATURE AND THIS RESEARCH'S CONTRIBUTIONS

Here, the Conclusion to this thesis employs the study's results to comment on the extant scholarship on Dodd-Frank era rulemaking at the CFTC and on that from the field of administrative agency rulemaking.

The findings of this study on OTC commodity derivative rulemaking directly contribute to the emerging body of existing literature on the Commission's Dodd-Frank-related rulemaking. Take, for example, the work of Ziegler and Woolley (2016) on CFTC rulemaking in the OTC derivatives space. Recall from Chapter 3 that these authors posited the existence of a 'stability alliance' – comprising non-industry, public advocacy groups – that was able to thwart the influence of derivative industry interests and to provide usable intellectual resources to Commission policymakers across multiple post-Dodd-Frank rule-makings. As noted by Ziegler and Woolley (2016), Better Markets, Inc. and Americans for Financial Reform were prominent members of this 'stability alliance', and routinely supplied intellectual resources, through comment letters, to the CFTC. Moreover, their study went so far as to imply the existence of a symbiotic relationship between the comment letters of Better Markets and the agency's OTC derivative regulations, in that Commission policymakers would cite the content of this advocacy group's letters to justify their regulatory positions (Ziegler and Woolley 2016: 270f).

Given the results of this inquiry into OTC commodity derivative rulemaking at the CFTC between 2010 and 2016, Ziegler and Woolley's position on the influence of a 'stability alliance' should be approached with a modicum of skepticism. While it is possible that a melding of non-industry, public advocacy group interests operationalized in comment letter form may have, to some extent, conditioned the rules targeted in Ziegler and Woolley (2016: 277) – none of which pertained to definitional aspects of swaps or those parties who trade swaps – a similar outcome cannot be seen in the context of revised OTC commodity derivative rulemaking. Notwithstanding Better Markets supporting the final form of forward contract exclusion (see Chapter 9), CFTC policymakers revised its treatment of embedded volumetric optionality in a way that privileged the interests of commodity industry actors (see Chapter 10) as during this revision to the forward contract exclusion, Better Markets, Americans for Financial Reform, and Public Citizen – a conceivable 'stability alliance' in its own right – petitioned the Commission to reconsider its revisions to the exception, but to absolutely no avail. If the concept of a 'stability alliance' took form during Dodd-Frank era rulemaking, it is possible that it only existed as a researcher-construed coalition affecting the narrow range of rules over the specific time period studied in Ziegler and Woolley (2016). Thus, the positions advanced by Ziegler and Woolley (2016) may not be generalizable across other Dodd-Frank-related CFTC rulemaking endeavors.

Other literature to which the findings of this study on OTC commodity derivative rulemaking can contribute include the works of Krug (2015) and Peirce (2014). The notion advanced by Krug (2015) that Commission policymakers viewed swaps as instruments of "pretending" can, to an extent, be supported by the case of OTC commodity derivative rulemaking. This is because, in the derivative rulemaking context, agency officials viewed those OTC commodity instruments which may or may not result in delivery (i.e., not binding a party to a fixed investment of capital), or which vary in terms of quantity delivered and price, as, at least in the first sense, regulatable swaps. Nevertheless, as pointed out in Chapter 3, and as implied by this project's overall findings, the concept of "pretending" should be seen as an outgrowth of the contractual feature of optionality; a highly salient characteristic of transactions in the OTC commodity derivative space and one omitted in Krug's construction of the conception of "pretending." For OTC commodity derivative transactions, "pretending" (as opposed to "investing") arises because of an embedded optional feature within a contract (e.g., delivery or non-delivery upon exercise of the intra-contractual option) for which one party maintains the right to exercise this feature, and the other party the obligation to perform, but for which this exercise remains an uncertain possibility (i.e., a pretense) until either done, or the contract expires.

With regards to Peirce (2014), this author's position that CFTC policymakers experienced internal and external pressures to hastily draft and finalize Dodd-Frank era rules does have credence, given the data presented in the analytical chapters of this thesis. Peirce (2014) is correct to posit that Commission officials may have put forth incomplete, expediently crafted rules for which they had to return through further rulemaking, or through other agency actions. A prime example of this in OTC commodity derivative rulemaking was explicated in Chapter 10 and involved the Division of Market Oversight issuing multiple no-action letters providing some regulatory relief to marketplace participants who were ostensibly unable to comply with regulations that would later be subject to revision. These no-action letters are a clear indication of the CFTC returning to a matter that may have been thought of as unfinished business.

As for the work of Helleiner (2018), one of this author's key propositions is that Commission rulemaking in the domain of OTC commodity derivatives reflected, in part, agency-specific "historical norms" and "distinct institutional environments." This notion can be supported by the findings of this thesis, particularly insofar as the recontextualization of existing regulatory precedent is concerned. For instance, in the Commission's efforts to define which OTC commodity derivatives would be regulated, CFTC policymakers recontextualized the Brent Interpretation and, through the agency's plenary authority, re-proposed a trade option exemption. And, to Helleiner's second point, as discussed in the above analytical chapters, distinct CFTC rulemaking groups impacted both commodity (trade) options and forward contract exclusion rulemaking. This suggests that factors such as agency norms, historical regulatory precedent, and intra-agency institutional design (i.e., the establishment or dissolution of rulemaking groups) played a part in conditioning OTC commodity derivative rulemaking.

Regarding the research of Pagliari (2018), this researcher posited that across many, though not all, Dodd-Frank era rules promulgated by the CFTC (and the SEC), business coalitions influenced regulatory outcomes in their favor. While the instant study on OTC commodity derivative rulemaking has shown that commodity business interests and trade groups did achieve, from their perspective, some positive regulatory outcomes, as analyzed herein, this was not universally the case at each stage of rulemaking. (And as will be discussed below, the positive outcomes that were achieved by industry were contingent on additional considerations.) Furthermore, the research herein has highlighted the importance of a variety of other semiotic and extra-semiotic factors – such as the availability and recontextualization of existing regulatory precedent, changes to the composition of Commission leadership, and the exercise of bureaucratic discretion by an agency chairperson to purse his or her regulatory vision (or policy preferences) which coincides with the interests of business coalitions – that conditioned OTC commodity derivative rulemaking; factors notably absent from the narrowly-focused research of Pagliari (2018). This highlights the efficacy of taking an expansive analytical approach – i.e., one that can consider a multitude of significant actors and factors, such as CPE – to the analysis of rulemaking and regulatory construction.

Now shifting away from how this study contributes to the existing scholarly literature on OTC derivative rulemaking, and commenting, instead, on the relationship between this CPE-backed study and the broader rulemaking scholarship covered in Chapter 3. A few remarks should be made concerning the intersection of the instant study and of theories of capture. While this research into OTC commodity derivative rulemaking has not sought to assess the efficacy of theories of capture, the findings of this study do, nonetheless, imply that regulators were not unintentionally captured by regulatees (and their representatives) over the course of rulemaking.

The complex matter of the regulatory treatment of forward contracts with embedded volumetric optionality best highlights this point. As stated in Chapter 9, outside industry parties were successfully able to attain an exclusion from regulation for some of these OTC contracts after they provided Commission policymakers with comment letters. Nevertheless, the exclusionary language that was adopted in the final rule-making proved largely unpalatable to these same participant – suggesting that while the agency was open to altering its selected regulatory approach on request from industry actors, the actual content of the regulation was not captured by these same external entities. With the arrival of Chairperson Massad and new CFTC leadership, however, the issue of volumetric optionality was revisited. The analysis conducted in Chapter 10 showed that the content of the revised exclusion for forward contracts containing volumetric options stemmed directly from some, though not all, comment letter requests made by commercial end-users and their representatives.

Although using external actor-provided commentary to inform the content of the revisions to regulation suggests capture by regulatees, the precondition to such capture must not be diminished in importance: newly-minted Chairperson Massad directed agency officials to review OTC commodity derivative regulations in an effort to allay the expressed concerns of commercial end-users. This meant that the discursive material which policymakers would utilize to inform the content of their revised regulations would necessarily come from these entities or their representatives. In this case, should a claim to capture be made, it is contingent on it being *intentional* in that the pre-existing regulatory beliefs of Chair Massad were compatible and intersected with the expressed interests of the regulatees whom the Chair sought, through rulemaking, to assist.

Even from the standpoint of cultural capture (Kwak 2014), the above analysis suggests that the agency's chairs were not captured. While Chairperson Gensler came from an executive-level position at the banking group Goldman Sachs, in addition to time spent at the U.S. Treasury Department, there is no evidence that he sought to direct the regulation of OTC commodity derivative users in a manner that could be considered wholly accommodating, and this despite his apparent congruent 'cultural' background. Considering his reputation in business circles as generally hostile to financial and business interests,[457] the regulatory actions of this powerful actor do not fit with the propositions of cultural capture.

Likewise, the Commission's rulemaking direction, and regulatory outcomes achieved, under Chair Massad, a former Treasury Department official, corporate attorney, and organizer for consumer rights' activist and Presidential candidate Ralph Nader, cannot be explained by the precepts of cultural capture. Here, Massad's regulatory mission to review OTC commodity derivative regulations affecting commercial end-users was articulated prior to his assumption of power within the CFTC (see Chapter 10). The direct implication of this extant disposition is that his eventual decision to overhaul OTC commodity derivative regulations was not driven by experienced 'cultural' affinities once in a position of influence.

These examples suggest that theories of capture have limited ability to provide idiosyncratic explanations of rulemaking outcomes, and that any ability to do so is not universally applicable to all rulemaking cases. The analyses of the OTC commodity derivative rule-makings, and the discussion provided immediately above, highlight that capture can be circumstantial and contingent; the *capacity* for capture should not be

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[457] Chon, Gina. "Gary Gensler defends record as he leaves CFTC". *Financial Times*, 30 December 2013. Available at: https://www.ft.com/content/90de8f24-6c1d-11e3-a216-00144feabdc0.

conflated with the *manifestation* of capture. This is especially evident during multi-phased, multi-year rulemaking – such as for OTC commodity derivatives – wherein changes to the milieu in which an agency undertakes rulemaking, and, also, to its relationship with regulatees, can be commonplace.

Continuing on to articulate something about this project's contributions to the research field of administrative agency rulemaking generally, a few items should be referenced. As it relates to the central proposition of Yackee's literature on external stakeholder *impact* on regulations through rule comments (see Chapter 3), outside party comments – specifically those of industry or its representatives provided at various moments during rulemaking – can *influence* the nature (i.e., content) of prescribed regulations. It should be noted that similarly to Rashin (2020), the instant study has gone beyond the works of Yackee and others reviewed in Chapter 3 in that it has sought to definitively establish – in this case through the analysis of intertextual, interdiscursive, and recontextualized dimensions of regulatory texts – the discursive links between the speech acts of external agency actors (among other things) and the content of drafted regulations. Nevertheless, as the findings of this study on OTC commodity derivative rulemaking indicate, such influence is neither universal in power, nor exclusive in terms of being a conditioning factor for regulatory development. Moreover, and, importantly, through this CPE-informed analysis, it has been shown that the ability of regulatees and their representatives to influence (and in some cases inform) the content of regulations can be contingent on other factors, such as synergy with a chairperson's expressed policy preferences and the discursive bounds afforded by the overriding statute.

For example, in regards to the absence of outside comments' universal power, notwithstanding the submission of comments by industry interests advocating the exact opposite, Commission policymakers steadfastly maintained their codified view that regulatable swaps were, in the first sense, synonymous with an option of any kind (i.e., a commodity, trade, or embedded volumetric option). And to the absence of exclusivity as a conditioning factor, while comments received were a contributing factor to the CFTC's reinstatement of a trade option exemption in its final Commodity Options rule (see Chapter 9), this exemption already had historically existed in agency rules, and its re-granting was accompanied by the application of reporting and recordkeeping requirements on trade option transactions (a potential cost to industry actors). Even in the case of the revised rulemakings (see Chapter 10), commodity industry commenters had provided their perspectives to Commission policymakers for a couple of years prior to the rule review, but with no alterations to regulations. Here, the impetus for change was the entry into a position of power of new CFTC leadership – principally Chairperson Massad. This official consistently articulated a modified regulatory vision for OTC commodity derivatives, a vision then exemplified by a new regulatory approach.

To this point, the findings from this inquiry into the case of OTC commodity derivative rulemaking suggest the importance of the Commission's Chairperson in influencing the character of the constructed regulations. While some of the literature reviewed in Chapter 3 posits that agency bureaucrats serve as the *de facto* agents of external principals (i.e., Congress, the President, and regulatees), the above analyzes have indicated that there does exist bureaucratic discretion on the part of the CFTC's Chair when acting within the bounds of an authorizing statute (e.g., the Dodd-Frank Act). This is particularly apparent insofar as setting a regulatory agenda and conditioning rule content (i.e., the selection of certain discourses used to inform rule-making) are concerned. As explored above, Chair Gensler and Chair Massad were each actively involved in directing the OTC commodity derivative rulemaking process, and both articulated distinct regulatory visions regarding the character of the prospectively constructed OTC commodity derivative regulations. In the end, the adopted regulatory approaches to these instruments taken during these internal agency actors' tenures mirrored the corresponding policy preferences that they expressed. Given this, scholarship on rulemaking should take seriously the influence of an agency's chairperson on rulemaking. (Nevertheless, as imparted by the literature reviewed earlier in this thesis, the discretion that a chair has over rulemaking can be tempered by the political actions of external actors – e.g., Congress and the President – but in the analysis of OTC commodity derivative rulemaking, this was not significantly the case.)

The case of OTC commodity derivative rulemaking can also provide an interesting reflection on the notion of 'structural prominence' – briefly reviewed in Chapter 3 – and its impact on administrative agency rulemaking as posited by Young (2015). While swap dealers and major swap participants (e.g., multinational, integrated energy companies BP and Shell) would likely be deemed 'structurally prominent' actors in the OTC commodity derivative space, and, thus, potentially better able to attain regulatory protections from policymakers, the revisions to the trade option exemption were simply not made applicable to such entities. Rather, Commission officials sought to reduce regulatory burdens on non-swap dealers and non-major swap participants through the modified exemption; potentially meaning that the extent of the influence of 'structural prominence' may be contingent on other factors, such as the policy preferences of an agency's chairperson (or of a voting majority of an agency's leadership). Additionally, further refinement of the 'structural prominence' concept could be made, especially given that, in the case of OTC commodity derivative rulemaking, some of the leading interested parties seeking to influence the CFTC's regulations were trade groups (without large numbers of employees or monetary assets in their own right; hence, possessors of neither structural power nor 'structural prominence'). These parties represented entities ranging from small commodity end-users to registered swap dealers. Despite such trade groups' apparent lack of actual structural prominence, Commission policymakers, nonetheless, utilized the content of some of these groups' comment letters to inform the agency's regulatory approach. Obviously, this leaves open the question of how diversely constituted trade groups, who themselves lack structural prominence, might fit within Young's administrative agency rulemaking model.

In addition to the above contributions to knowledge of Dodd-Frank era rulemaking and to some of the particulars of this administrative process, this project also makes contributions to the broad field of rulemaking in two further ways. First, by employing a longitudinal, qualitative study, this project has been able analyze a very particular and limited rulemaking subject in each of its distinctive iterations: advance notices of proposed rulemaking, notices of proposed rulemaking, final rules, and revised rules. As such, this research into OTC commodity derivative rulemaking reveals the importance of examining each of the individual steps along the entire rulemaking spectrum. Such is necessary to formulate a completely understanding of the construction of regulations given, as what Wilson (1980) intimated, that rulemaking is a heterogeneous process with manifold contingent contributing influences and factors to consider. By virtue of undertaking the inquiry into OTC commodity derivative rulemaking in this manner, this study contributes a possible framework for how to structure qualitative research into the creation of rules and regulations.

The second of these contributions is through this study's advancement of CPE into the scholarly domain of rulemaking. In applying this theoretical framework, multiple analytical strands concerning this administrative process have been woven together and examined. The central additions to rulemaking literature made by having explored OTC commodity derivative rulemaking from the perspective of CPE are as follows: (1) CPE's analytical lenses (i.e., semiosis and structuration through the four selectivities) have allowed for a novel exploration of a multiplicity of interlinked influences on rule development (including those referenced in the extant rulemaking literature), (2) the CPE-informed analyses conducted above have gone beyond existing approaches to rulemaking analysis, such as the ACF, in that CPE has facilitated a coherent, interwoven assessment of micro-level considerations (e.g., the content of rules, comment letters, and policymaker speech acts) through to those at the macro-level (e.g., historical as well as contextual matters of political economy and relating to a policy 'imaginary'), (3) utilizing CPE has introduced the concept of a guiding (policy) 'imaginary' into scholarship on U.S. administrative agency rulemaking, and (4) CPE has facilitated an efficaciously structured analysis of rulemaking (i.e., one utilizing rule content as the analytical entry-point before moving onto an assessment of those multi-level semiotic and extra-semiotic influences that interacted and co-evolved – in conjunction with the process of variation, selection, and retention – to condition regulatory construction).

Furthermore, this study of OTC commodity derivative rulemaking also contributes to the growing body of CPE literature. This is the case because this inquiry advances CPE into a research domain – that of administrative agency rulemaking – left untouched by existing CPE scholarship, and because the study further refines the CPE theoretical framework through its application to analyzing rulemaking. As such, this project provides a possible guide for future CPE-based rulemaking research.

AREAS OF FURTHER RESEARCH

Several further research opportunities involving CPE and the field of administrative agency rulemaking exist. Most directly, CPE-informed analyses of other Dodd-Frank era rules –

whether crafted by the Commission or SEC, among others – could be pursued to enrich the literature. Among such opportunities could be research into the formation of the regulations constituting the CFTC's post-trade regulatory infrastructure (i.e., rules for reporting and recordkeeping, clearing, margining, and position limits).

Another potential vein for exploring in further research could be the development of a firm set of procedures for best operationalizing CPE in the context of administrative agency rulemaking. Although the instant study has set out its own methodological procedure for doing as much in the narrow domain of OTC commodity derivative rulemaking, future research employing CPE as a theoretical framework for guiding analyses of rulemaking could endeavor to build a more universally-minded set of procedures. This could take the form of a critically derived 'how to' guide to operationalizing CPE in the context of rulemaking.

Furthermore, future studies of financial regulatory rulemaking might benefit from an integration of, or marriage between, the various theories of capture and an applied research program such as CPE. For instance, a synthesis of knowledge capture and the CPE framework in the context of a qualitative rulemaking study might use semiosis as an entry-point to analyze how the expressed perspectives of 'knowledgeable' outside party commenters achieve intellectual hegemony over the content of financial regulations. Still yet other rulemaking research might seek to similarly incorporate CPE with other analytical perspectives, such as the ACF, to analyze cases pertaining to this administrative process.

Finally, since this study of OTC commodity derivative rulemaking has highlighted the significant influence that the CFTC's Chairperson had on the character of regulation for these financial instruments, additional research examining this phenomenon across other administrative agencies and rulemaking events is warranted. As noted in Chapter 3, there exists scant scholarship on this issue. Thus, inquiring into the influence of chairpersons on rulemaking could enrich knowledge in regard to this administrative process as well as to the notions of bureaucratic discretion and agenda setting.

REFERENCES

Abdel-khalik, A.R. and Chen, P.C. 2015, 'Growth in financial derivatives: The public policy and accounting incentives', *Journal of Accounting and Public Policy*, 34, 3, pp. 291-318.

Albrecht, W.P. 1995, 'Regulation of Exchange-Traded OTC Derivatives: The Need for a Comparative Institution Approach', *The Journal of Corporation Law*, 21, 1, pp. 111-129.

Aman, A.C. 1988, 'Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency', *Cornell Law Review*, 73, 6, pp. 1101-1247.

Aman, A.C. and Mayton, W.T. 1993, *Administrative Law*, 2nd ed., St. Paul, MN: West Publishing Company.

Anderson, J.E. 2006, *Public Policymaking*, 6th ed., Boston: Houghton Mifflin Company.

Archer, M.S., Bhaskar, R., Collier, A., Lawson, T., and Norrie, A. 1998, *Critical Realism: Essential Readings*, London: Routledge.

Assiter, A. 2013, 'Speculative and Critical Realism', *Journal of Critical Realism*, 12, 3, pp. 283-300.

Awrey, D. 2012, 'Complexity, Innovation, and the Regulation of Modern Financial Markets', *Harvard Business Law Review*, 2, 2, pp. 235-294.

Azungah, T. 2018, 'Qualitative Research: Deductive and Inductive Approaches to Data Analysis', *Qualitative Research Journal*, 18, 4, pp. 383-400.

Baker, C. 2010, 'Regulating the Invisible: The Case of Over-the-Counter Derivatives', *The Notre Dame Law Review*, 85, 4, pp. 1287-1378.

Balla, S.J. 1998, 'Administrative Procedures and Political Control of the Bureaucracy', *American Political Science Review*, 92, 3, pp. 663-673.

Balla, S. J. 2015, 'Political Control, Bureaucratic Discretion, and Public Commenting on Agency Regulations', *Public Administration*, 93, 2, pp. 524-538.

Becker, E. 2016, *Knowledge Capture in Financial Regulation: Data-, Information-, and Knowledge-Asymmetries in the US Financial Crisis*, Wiesbaden: Springer Fachmedien Wisebaden.

Becker, E. and Willke, H. 2013, 'A Demonstrably Fragile Financial System: Information and Knowledge Asymmetries in the Global Financial Crisis', in *Fragile Stabilität – Stabile Fragilität*, S.A. Jansen, E. Schröter, and N. Stehr (eds.), Wiesbaden: VS Verlag, pp. 219-242.

Beckert, J. 2013, 'Capitalism as a System of Expectations: Toward a Sociological Microfoundation of Political Economy', *Politics & Society*, 41, 3, pp. 323-350.

Beckert, J. 2016, *Imagined Futures: Fictional Expectations and Capitalist Dynamics*, Cambridge, MA: Harvard University Press.

Belfrage, C. and Hauf, F. 2015, ‘Operationalizing cultural political economy: towards critical grounded theory’, *Journal of Organizational Ethnography*, 4, 3, pp. 324-340.

Belfrage, C. and Hauf, F. 2017, ‘The Gentle Art of Retroduction: Critical Realism, Cultural Political Economy and Critical Grounded Theory’, *Organization Studies*, 38, 2, pp. 251-271.

Bernstein, M.H. 1955, *Regulating Business by Independent Commission*, Princeton: Princeton University Press.

Bhaskar, R. 1975, *A Realist Theory of Science*, Leeds: Leeds Books.

BIS 2017*, Semiannual OTC derivatives statistics* [Online]. Available at: http://www.bis.org/statistics/derstats.htm. [Accessed: 16 June 2017].

Black, J., Hashimzade, N., and Myles, G. 2017, *Dictionary of Economics*, Oxford: Oxford University Press.

Blank, S.C., Carter, C.A. and Schmiesing, B.H. 1991, *Futures and Options Markets: Trading in Financials and Commodities*, Englewood Cliffs, NJ: Prentice-Hall, Inc.

Blyth, M. 2013, *Austerity: The History of a Dangerous Idea*, Oxford: Oxford University Press.

Braver, L. 2007, *A Thing of This World: A History of Continental Anti-Realism*, Evanston, IL: Northwestern University Press.

Brealey, R.A., Myers, S.C. and Marcus, A.J. 2007, *Fundamentals of Corporate Finance*, 5th ed., New York: McGraw-Hill/Irwin.

Brown-Hruska, S. 2010, ‘The Derivatives Marketplace: Exchanges and the Over-the-Counter Market’, in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb. and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 21-42.

Bruff, H.H. 1979, ‘Presidential Power and Administrative Rulemaking’, *The Yale Law Journal*, 88, 3, pp. 451-508.

Brunet, A. and Shafe, M. 2007, ‘Beyond Enron: Regulation in Energy Derivatives Trading’, *Northwestern Journal of International Law & Business*, 27, 3, pp. 665-706.

Bryant, L.R. 2014, *Onto-Cartography: An Ontology of Machines and Media*, Edinburgh: Edinburgh University Press.

Cairney, P. 2012, *Understanding Public Policy: Theories and Issues*, Basingstoke: Palgrave Macmillan.

Calvert, R. L, McCubbins, M.D., and Weingast, B.R. 1989, ‘A Theory of Political Control and Agency Discretion’, *American Journal of Political Science*, 33, 3, pp. 588-611.

Carlton, D.W. 1984, ‘Futures Markets: Their Purpose, Their History, Their Growth, Their Successes and Failures’, *The Journal of Futures Markets*, 4, 3, pp. 237-271.

Carpenter, D. 1996, ‘Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation’, *American Political Science Review*, 90, 2, pp. 283-303.

Carpenter, D. 2010, ‘Institutional Strangulation: Bureaucratic Politics and Financial Reform in the Obama Administration’, *Perspectives on Politics*, 8, 3, pp. 825-846.

Carpenter, D. 2014, ‘Detecting and Measuring Capture’, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, D. Carpenter and D.A. Moss (eds.), Cambridge: Cambridge University Press, pp. 57-68.

Carpenter, D. and Moss, D.A. 2014, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, Cambridge: Cambridge University Press.

Carrigan, C. and Coglianese, C. 2016, ‘Capturing Regulatory Reality: Stigler’s *The Theory of Economic Regulation*’, *Faculty Scholarship: University of Pennsylvania Law School*, Paper 1650, pp. 1-13, Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2651&context=faculty_scholarship [Accessed on 27 March 2018].

Carruthers, B.C. 2013, ‘Diverging derivatives: Law, governance and modern financial markets’, *Journal of Comparative Economics*, 41, 2, pp. 386-400.

Carstensen, M.B. and Schmidt, V.A. 2016, ‘Power through, over and in ideas: conceptualizing ideational power in discursive institutionalism’, *Journal of European Public Policy*, 23, 3, pp. 318-337.

CFTC 2007, *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets*, Commodity Futures Trading Commission: October 2007. Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf [Accessed on 4 January 2018].

CFTC 2019, *CFTC Glossary*. Available at: https://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm [Accessed on 19 September 2019].

Chancellor, E. 2000, *Devil Take the Hindmost: A History of Financial Speculation*, New York: Plume.

Clark, G.W. 1978, ‘Genealogy and Genetics of Contract of Sale of a Commodity for Future Delivery in the Commodity Exchange Act’, *Emory Law Journal*, 27, 4, pp. 1175-1223.

Crow, D.A., Albright, E.A., and Koebele, E. 2017, ‘Evaluating Informational Inputs in Rulemaking Processes: A Cross-Case Analysis’, *Administration & Society*, 49, 9, pp. 1318-1345.

Culpepper, P. and Reinke, R. 2014, ‘Structural Power and Bank Bailouts in the United Kingdom and the United States’, *Politics & Society*, 42, 4, pp. 427-454.

Datla, K. and Revesz, R.L. 2013, ‘Deconstructing Independent Agencies (and Executive Agencies)’, *Cornell Law Review*, 98, 4, pp. 769-844.

Decovny, S. 1998, *Swaps*, London: Prentice Hall Europe.

Defoe, D. 2010, *A Journal of the Plague Year*, Oxford: Oxford University Press.

DeLanda, M. 2016, *Assemblage Theory*, Edinburgh: Edinburgh University Press.

DeLanda, M. and Harman, G. 2017, *The Rise of Realism*, Cambridge: Polity Press.

Duffy, R.J. 2003, *The Green Agenda in American Politics: New Strategies for the Twenty-First Century*, Lawrence, KS: University Press of Kansas.

Dunn Jr., R.E. 1982, 'Regulatory Jurisdiction Over Commodity Options: CFTC or SEC', *Journal of Legislation*, 9, 1, pp. 103-117.

Edwards, F.R. 1983, 'The Clearing Association in Futures Markets: Guarantor and Regulator', *The Journal of Futures Markets*, 3, 4, pp. 369-392.

Electric Light & Power 1999, 'Enron goes online', *Electric Light & Power*, 77, 12, pp. 27.

Epstein, R.A. 2016, 'The Role of Guidances in Modern Administrative Procedure: The Case of De Novo Review', *Journal of Legal Analysis*, 8, 1, pp. 47-93.

Fairclough, N. 1992, *Discourse and Social Change*, Cambridge, Mass.: Polity Press.

Fairclough, N. 1993, 'Critical discourse analysis and the marketization of public discourse: the universities', *Discourse & Society*, 4, 2, pp. 133-168.

Fairclough, N. 2003, '"Political correctness": the politics of culture and language', *Discourse & Society*, 14, 1, pp. 17-28.

Fairclough, N. 2005, 'Discourse Analysis in Organization Studies: The Case for Critical Realism', *Organization Studies*, 26, 6, pp. 915-939.

Fairclough, N. 2013, 'Critical discourse analysis and critical policy studies', *Critical Policy Studies*, 7, 2, pp. 177-197.

Fairclough, N. and Wodak, R. 1997, 'Critical discourse analysis: an overview' in *Discourse and Interaction*, Teun van Dijk (ed.), London: SAGE, pp. 67-97.

Farina, C.R. 1989, 'Statutory Interpretation and the Balance of Power in the Administrative State', *Columbia Law Review*, 89, 3, pp. 452-528.

Farina, C.R., Epstein, D., Heidt, J., and Newhart, M.J. 2012, 'Knowledge in the People: Rethinking Value in Public Rulemaking Participation', *Wake Forest Law Review*, 47, 5, pp. 1185-1242.

Ferejohn, J. and Shipan, C. 1989, 'Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy', in *Congress Reconsidered* (4th ed.), L.C. Dodd and B.I. Oppenheimer (eds.), Washington, D.C.: CQ Press.

Ferrarini, G. and Saguato, P. 2015, 'Regulating Financial Market Infrastructures', in *The Oxford Handbook of Financial Regulation*, N. Moloney, E. Ferran, and J. Payne (eds.), Oxford: Oxford University Press, pp. 569-595.

Firestone, W.A. 1993, 'Alternative Arguments for Generalizing from Data as Applied to Qualitative Research', *Educational Researcher*, 22, 4, pp. 16-23.

GAO 1997, *The Commodity Exchange Act: Legal and Regulatory Issues Remain*, United States General Accounting Office Report to Congressional Committees: GAO/GGD-97-50. Available at: https://www.gao.gov/assets/230/223851.pdf [Accessed on 27 December 2017].

GAO 1999, *The Commodity Exchange Act: Issues Related to the Commodity Futures Trading Commission's Reauthorization*, United States General Accounting Office Report to Congressional Committees: GAO/GGD-99-74. Available at: https://www.gao.gov/assets/230/227199.pdf [Accessed on 27 December 2017].

GAO 2007*, Commodity Futures Trading Commission: Trends in Energy Derivatives Markets Raise Questions about CFTC's Oversight*, United States Government Accountability Office Report to Congressional Addressees: GAO-08-25. Available at: https://www.gao.gov/assets/270/268168.pdf [Accessed on 27 December 2017].

Gaventa, J. 1980, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*, Urbana, IL: University of Illinois Press.

Giddens, A. 1976, *New Rules of Sociological Method: A Positive Critique of Interpretive Sociologies*, London: Hutchinson.

Giddens, A. 1979, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis*, London: Macmillan.

Giddens, A. 1984, *The Constitution of Society: Outline of the Theory of Structuration*, Cambridge, UK: Polity Press.

Gkanoutas-Leventis, A. and Nesvetailova, A. 2015, 'Financialisation, oil and the Great Recession', *Energy Policy*, 86, pp. 891-902.

Golden, M.M. 1998, 'Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?', *Journal of Public Administration Research and Theory*, 8, 2, pp. 245-270.

Gowlan, D. 1990, *The Regulation of Financial Markets in the 1990s*, Hants, England: Edward Elgar.

Greenberger, M. 2010, 'Out of the Black Hole: Reining in the reckless market in over-the-counter derivatives', *The American Prospect*, 21, 5, pp. A8-A10.

Greenberger, M. 2011, 'Overwhelming and Financial Regulatory Black Hole with Legislative Sunlight: Dodd-Frank's Attack on Systemic Economic Destabilization Caused by an Unregulated Multi-Trillion Dollar Derivatives Market', *Journal of Business & Technology Law*, 6, 1, pp. 127-167.

Greenberger, M. 2013, 'Closing Wall Street's Commodity and Swaps Betting Parlors: Legal Remedies to Combat Needlessly Gambling Up the Price of Crude Oil Beyond What Market Fundamentals Dictate', *George Washington Law Review*, 81, 3, pp. 707-748.

Greenstone, W.D. 1977, 'The CFTC and Government Reorganization: Preserving Regulatory Independence', *The Business Lawyer*, 33, 1, pp. 163-219.

Griffith, S.J. 2013, 'The Derivatives Clearinghouse: Designing a Governance Structure to Manage Systemic Risk', *Banking & Financial Services Policy Report*, 32, 4, pp. 13-23.

Grubbauer, M. 2014, 'Architecture, Economic Imaginaries and Urban Politics: The Office Tower as Socially Classifying Device', *International Journal of Urban and Regional Research*, 38, 1, pp. 336-59.

Haeder, S.F and Yackee, S.W. 2019, 'Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?', *Journal of Public Administration Research and Theory*, 28, 4, pp. 475-488.

Haldar, S.K. and Tišljar, J. 2014, *Introduction to Mineralogy and Petrology*, Waltham, MA: Elsevier.

Harman, G. 2016a, *Immaterialism*, Cambridge: Polity Press.

Harman, G. 2016b, *Dante's Broken Hammer*, London: Repeater Books.

Harré, R. and Bhaskar, R. 2001, 'How to change reality: Story vs. structure – A debate between Rom Harré and Roy Bhaskar', in *After Postmodernism, an Introduction to Critical Realism*, J. Lopez and G. Potter (eds.), London: Continuum, pp. 22-38.

Hazen, T.L. 2005, 'Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance', *Annual Review of Banking and Financial Law*, 24, pp. 375-441.

Heclo, H. 1977, *A government of strangers: executive politics in Washington*, Washington D.C.: Brookings Institution Press.

Heinrich, M. 2015, 'EU governance in crisis: A cultural political economy perspective on European crisis management 2007-2014', *Comparative European Politics*, 13, 6, pp. 682-706.

Helleiner, E. 2018, 'Positioning for Stronger Limits? The Politics of Regulating Commodity Derivative Markets', in *Governing the World's Biggest Market: The Politics of Derivatives Regulation After the 2008 Crisis*, E. Helleiner, S. Pagliari, and I. Spagna (eds.), New York: Oxford University Press, pp. 199-225.

Herz, M. 2012, 'American Bar Association Section of Administrative Law and Regulatory Practice: Comments on H.R. 3010, The Regulatory Accountability Act of 2011', *Administrative Law Review*, 64, 3, pp. 619-671.

Ho., D.E. 2010, 'Measuring Agency Preferences: Experts, Voting, and the Power of Chairs', *DePaul Law Review*, 59, 1, pp. 333-370.

Huber, J.D., Shipan, C.R., and Pfahler, M. 2001, 'Legislatures and Statutory Control of Bureaucracy', *American Journal of Political Science*, 45, 2, pp. 330-345.

Hull, J.C. 2008, *Fundamentals of Futures and Options Markets*, 6th ed., Upper Saddle River, NJ: Pearson Education.

Hull, J.C. 2014, *Fundamentals of Futures and Options Markets*, 8th ed., Boston: Pearson Education.

Im, J.J. 2013, 'Cultural Differences between U.S. Federal Financial Regulators and Implications for Interagency Collaboration', *International Review of Public Administration*, 18, 2, pp. 109-144.

Jessop, B and Sum, N. 2017, 'Putting the "Amsterdam School" in its Rightful Place: A Reply to Juan Ignacio Staricco's Critique of Cultural Political Economy', *New Political Economy*, 22, 3, pp. 342-354.

Jessop, B. 2004, ‘Critical semiotic analysis and cultural political economy’, *Critical Discourse Studies*, 1, 2, pp. 159-174.

Jessop, B. 2010, ‘Cultural political economy and critical policy studies’, *Critical Policy Studies*, 3, 3-4, pp. 336-356.

Jessop, B. 2013, ‘Recovered imaginaries, imagined recoveries, a cultural political economy of crisis construals and crisis-management in the North Atlantic financial crisis’, in *Before and Beyond the Global Economic Crisis: Economics, Politics and Settlement*, M. Benner (ed.), Cheltenham: Edward Elgar, pp. 234-254.

Jessop, B. 2015, ‘A Cultural Political Economy Approach to the Governance of Global Social Policy’, in *Actors and Agency in Global Social Governance*, A. Kaasch and K. Martens (eds.), Oxford: Oxford University Press, pp. 18-42.

Jessop, B. 2016, ‘A cultural political economy of legal regulation of monopoly and competition’, *Environment and Planning A*, 48, 12, pp. 2541-2546.

Jessop, B. and Oosterlynck, S. 2008, ‘Cultural political economy: On making the cultural turn without falling into soft economic sociology’, *Geoforum*, 39, 3, pp. 1155-1169.

Jessop, B. and Sum, N. 2010, ‘Cultural Political Economy: Logics of Discovery, Epistemic Fallacies, the Complexity of Emergence, and the Potential of the Cultural Turn’, *New Political Economy*, 15, 3, pp. 445-451.

Jessop, B. and Sum, N. 2016, ‘What is critical?’, *Critical Policy Studies*, 10, 1, pp. 105-109.

Jessop, B. and Sum, N. 2018, ‘Geopolitics: Putting geopolitics in its place in cultural political economy’, *Environment and Planning A*, 50, 2, pp. 474-478.

Jickling, M. 2008a, *Regulation of Energy Derivatives*, CRS Report for Congress: Order Code RS21401. Available at: https://www.everycrsreport.com/files/20080707_RS21401_4a060890b88bca5cf9688ceb7d8e369bf788dd93.pdf [Accessed on 20 December 2017].

Jickling, M. 2008b, *The Enron Loophole*, CRS Report for Congress: Order Code RS22912. Available at: https://www.everycrsreport.com/files/20080707_RS22912_526be317ec7cc2fc1ab5948ae4d3b69584d6fb2d.pdf [Accessed on 20 December 2017].

Jones, M. 2008, ‘Recovering a sense of political economy’, *Political Geography*, 27, 4, pp. 377-399.

Jones, P. 2007, ‘Why there is no such thing as “critical discourse analysis”’, *Language & Communication*, 27, pp. 337-368.

Jones, P. 2009, ‘Putting Architecture in its Social Place: A Cultural Political Economy of Architecture’, *Urban Studies*, 46, 12, pp. 2519-2536.

Kamieniecki, S. 2006, *Corporate America and Environmental Policy: How Often Does Business Get Its Way?*, Stanford: Stanford University Press.

Kannan, P.M. 1996, ‘The Logical Outgrowth Doctrine in Rulemaking’, *Administrative Law Review*, 48, 2, pp. 213-226.

Keaveny, J. 2005, ‘In Defense of Market Self-Regulation – An Analysis of the History of Futures Regulation and the Trend Toward Demutualization’, *Brooklyn Law Review*, 70, 4, pp. 1419-1452.

Kerwin, C.M. 2003, *Rulemaking: How Government Agencies Write Law and Make Policy*, 3rd edition, Washington, D.C.: Congressional Quarterly Press.

Kerwin, C.M. and Furlong, S.R. 2011, *Rulemaking: How Government Agencies Write Law and Make Policy*, 4th edition, Washington, D.C.: Congressional Quarterly Press.

Ketcham-Colwill, P. 2014, ‘Presidential Influence over Agency Rulemaking through Regulatory Review’, *George Washington Law Review*, 82, 5, pp. 1622-1653.

Kim, Y-J. and Roh, C-Y. 2008, ‘Beyond the Advocacy Coalition Framework in Policy Process’, *International Journal of Public Administration*, 31, 6, pp. 668-689.

Kingdon, J.W. 2003, *Agendas, Alternatives, and Public Policies*, New York: Longman.

Kirilenko, A. Mankad, S. and Michailidis, G. 2014, ‘Do U.S. Regulators Listen to the Public? Testing the Regulatory Process with the RegRank Algorithm’, Proceedings of the ACM SIGMOD International Conference on Management of Data, 22 June 2014.

Kloner, D. 2001, ‘The Commodity Futures Modernization Act of 2000’, *Securities Regulation Law Journal*, 29, 3, pp. 286-297.

Knott, J. and Miller, G.J. 1987, *Reforming Bureaucracy*, Englewood Cliffs, NJ: Prentice-Hall.

Kolb, R.W. 1991, *Understanding Futures Markets*, 3rd ed., Miami: Kolb Publishing Company.

Koppenhaver, G.D. 2010, ‘Derivative Instruments: Forwards, Futures, Options, Swaps, and Structured Products’ in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 3-20.

Krug, A.K. 2015, ‘Investing and Pretending’, *Iowa Law Review*, 100, 4, pp. 1559-1618.

Kuserk, G. 2010, ‘Speculation and Hedging’ in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 43-55.

Kwak, J. 2014, ‘Cultural Capture and the Financial Crisis’, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, D. Carpenter and D.A. Moss (eds.), Cambridge: Cambridge University Press, pp. 71-98.

Latour, B. and Woolgar, S. 1986, *Laboratory Life: The Construction of Scientific Facts*, Princeton: Princeton University Press.

Law, J. and Brindley, B. 2008, *A Dictionary of Finance and Banking*, 4th ed., Oxford: Oxford University Press.

Leifeld, P. 2013, ‘Reconceptualizing Major Policy Change in the Advocacy Coalition Framework: A Discourse Network Analysis of German Pension Politics’, *The Policy Studies Journal*, 41, 1, pp. 169-198.

Leon, R. 1994, 'The Regulation of Derivatives and the Effect of the Futures Trading Practices Act of 1992', *Journal of Law and Policy*, 3, 1, pp. 321-345.

Levy, D. and Spicer, A. 2013, 'Contested imaginaries and the cultural political economy of climate change', *Organization*, 20, 5, pp. 659-678.

Levy, J.I. 2006, 'Contemplating Delivery: Futures Trading and the Problem of Commodity Exchange in the United States, 1875-1905', *The American Historical Review*, 111, 2, pp. 307-335.

Leydesdorff, L. 2010, 'The Communication of Meaning and the Structuration of Expectations: Giddens' "Structuration Theory" and Luhmann's "Self-Organization"', *Journal of the American Society for Information Science and Technology*, 61, 10, pp. 2138-2150.

Lindblom, C.E. 1977, *Politics and Markets: The World's Political-Economic Systems*, New York: Basic Books.

Lindholm, J.A. 1994, 'Financial Innovation and Derivatives Regulation – Minimizing Swap Credit Risk Under Title V of the Futures Trading Practices Act of 1992', *Columbia Business Law Review*, 1994, 1, pp. 73-111.

Lower, R.C. 1978, 'The Regulation of Commodity Options', *Duke Law Journal*, 1978, 5, pp. 1095-1145.

Lukes, S.L. 2005, *Power: A Radical View*, 2nd edition, New York: Palgrave MacMillan.

Lukken, W.L. 2010, 'The Regulation of U.S. Commodity Futures and Options', in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb. and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 295-303.

MacDonald, J.A. 2010, 'Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions', *The American Political Science Review*, 104, 4, pp. 766-782.

MacKenzie, D. 2018, 'Material Signals: A Historical Sociology of High-Frequency Trading', *American Journal of Sociology*, 123, 6, pp. 1635-1683.

Malterud, K. 2001, 'Qualitative Research: Standards, Challenges, and Guidelines', *The Lancet*, 358, 9280, pp. 483-488.

Markham, J.W. 1987, *The History of Commodity Futures Trading and its Regulation*, New York: Praeger.

Markham, J.W. 1990, 'Regulation of Hybrid Instruments under the Commodity Exchange Act: A Call for Alternatives', *Columbia Business Law Review*, 1990, 1, pp. 1-59.

Markham, J.W. 2002, *A Financial History of the United States, Volume III: From the Age of Derivatives into the New Millennium (1970-2001)*, Armonk, NY: M.E. Sharpe

Markham, J.W. 2003, 'Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan', Brooklyn Journal of International Law, 28, 2, pp. 319-410.

Markham, J.W. 2009, 'Merging the SEC and CFTC – A Clash of Cultures', *University of Cincinnati Law Review*, 78, 2, pp. 537-611.

Markham, J.W. 2014, *Law Enforcement and the History of Financial Market Manipulation*, Armonk, NY: M.E. Sharpe.

Markham, J.W. and Bergin, K.K. 1984, 'Problems with Futures Trading', *International Finance Law Review*, 3, 5, pp. 23-25.

Markham, J.W. and Harty, D.J. 2008, 'For Whom the Bell Tolls: The Demise of Exchange Trading Floors and the Growth of ECNs', *The Journal of Corporation Law*, 33, 4, pp. 865-939.

Maxwell, J.A. 2005, *Qualitative Research Design: An Interactive Approach*, 2nd edition, Thousand Oaks, CA: Sage Publications.

Mayblin, L. 2016, 'Complexity reduction and policy consensus: Asylum seekers, the right to work, and the "pull factor" thesis in the UK context', *The British Journal of Politics and International Relations*, 18, 4, pp. 812-828.

McBride, P.M. 2010, 'The Dodd-Frank Act and OTC Derivatives: The Impact of Mandatory Central Clearing on the Global OTC Derivatives Market', *The International Lawyer*, 44, 4, pp. 1077-1122.

McCarty, N. 2014, 'Complexity, Capacity, and Capture', in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, D. Carpenter and D.A. Moss (eds.), Cambridge: Cambridge University Press, pp. 99-123.

McCubbins, M.D. and Schwartz, T. 1984, 'Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms', *American Journal of Political Science*, 28, 1, pp. 165-179.

McCubbins, M.D., Noll, R.G., and Weingast, B.R. 1987, 'Administrative Procedures as Instruments of Political Control', *Journal of Law, Economics, & Organization*, 3, 2, pp. 243-277.

McGarity, T.O. 1992, 'Some Throughts on "Deossifying" the Rulemaking Process', *Duke Law Journal*, 41, 6, pp. 1385-1462.

McKay, A. and Yackee, S.W. 2007, 'Interest Group Competition on Federal Agency Rules', *American Politics Research*, 35, 3, pp. 336-357.

McLean, B. and Elkind, P. 2003, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron*, New York: Portfolio.

Meer, C.J. 1991, 'Hybrid Instruments: Their Treatment Under Recent Commodity Futures Trading Commission Releases', *The Business Lawyer*, 46, 2, pp. 405-426.

Millo, Y. and MacKenzie, D. 2009, 'The usefulness of inaccurate models: Towards an understanding of the emergence of financial risk management', *Accounting, Organizations and Society*, 34, 5, pp. 638-653.

Minsky, H.P. 2008 [1986], *Stabilizing an Unstable Economy*, New York: McGraw-Hill.

Mir, R. and Watson, A. 2000, ‘Strategic management and the philosophy of science: The case for a constructivist methodology’, *Strategic Management Journal*, 21, 9, pp. 941-953.

Moe, T.M. 1982, ‘Regulatory Performance and Presidential Administration’, *American Journal of Political Science*, 26, 2, pp. 197-224.

Moe, T.M. 1985, ‘Control and Feedback in Economic Regulation: The Case of the NLRB’, *American Political Science Review*, 79, 4, pp. 1094-1116.

Moe, T.M. 2012, ‘Delegation, Control, and the Study of Public Bureaucracy’, *Forum: A Journal of Applied Research in Contemporary Politics*, 10, 2, Article 4, pp. 1-45.

Morton, T. 2013, *Hyperobjects: Philosophy and Ecology after the End of the World*, Minneapolis: University of Minnesota Press.

Muellerleile, C. 2015, ‘Speculative boundaries: Chicago and the regulatory history of US financial derivative markets’, *Environment and Planning A*, 47, 9, pp. 1805-1823.

Natow, R. S. 2013, *Making Policy in the United States Department of Education: The Political Process of Federal Rulemaking for Higher Education*, Doctoral Dissertation: UMI No. 3567153.

Natow, R.S. 2015, ‘From Capitol Hill to Dupont Circle and beyond: The Influence of Policy Actors in the Federal Higher Education Rulemaking Process’, *The Journal of Higher Education*, 86, 3, pp. 360-386.

Naughton, K., Schmid, C., Yackee, S.W., and Zhan, X. 2009, ‘Understanding Commenter Influence during Agency Rule Development’, *Journal of Policy Analysis and Management*, 28, 2, pp. 258-277.

Nelson, D. and Yackee, S.W. 2012, ‘Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking’, *The Journal of Politics*, 74, 2, pp. 339-353.

Niskanen, W.A. 1971, *Bureaucracy and Representative Government*, Chicago: Aldine Atherton.

Overdahl, J. 2010, ‘Counterparty Credit Risk’, in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb. and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 283-294.

Pagliari, S. 2018, ‘The Second Half: Interest Group Conflicts and Coalitions in the Implementation of the Dodd-Frank Act Derivatives Rules’, in *Governing the World’s Biggest Market: The Politics of Derivatives Regulation After the 2008 Crisis*, E. Helleiner, S. Pagliari, and I. Spagna (eds.), New York: Oxford University Press, pp. 137-167.

Pan, E. 2012, ‘Understanding Financial Regulations’, *Utah Law Review*, 2012, 4, pp. 1897-1947.

Paroske, M. 2011, ‘Argumentation and Federal Rulemaking’, *Controversia*, 7, 2, pp. 34-53.

Partnoy, F. 2001, ‘The Shifting Contours of Global Derivatives Regulation’, *University of Pennsylvania Journal of International Economic Law*, 22, 3, pp. 421-495.

Pasachoff, E. 2016, 'The President's Budget as a Source of Agency Policy Control', *Yale Law Journal*, 125, 8, pp. 2182-2290.

Pashigian, B.P. 1986, 'The Political Economy of Futures Market Regulation', *The Journal of Business*, 59, 2, pp. S55-S84.

Peirce, H. 2014, 'Regulating through the Back Door at the Commodities Futures Trading Commission', Working Paper, Mercatus Center George Mason University, Available at: https://www.mercatus.org/system/files/Peirce-Back-Door-CFTC.pdf [Accessed on 23 February 2018].

Penick, M.A. 2010, 'The Development and Current State of Derivatives Markets', in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb. and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 233-248.

Perry, J. and Wise, L.R. 1990, 'The Motivational Bases of Public Service', *Public Administration Review*, 50, 3, pp. 367-373.

Perry, J.L., Hondeghem, A., and Wise, L.R. 2010, 'Revisiting the Motivational Bases of Public Service: Twenty Years of Research and an Agenda for the Future', *Public Administration Review*, 70, 5, pp. 681-690.

Peters, L., Pressey, S, Vanharanta, M, and Johnston, W. 2013, 'Constructivism and critical realism as alternative approaches to the study of business networks: Convergences and divergences in theory and in research practice', *Industrial Marketing Management*, 42, 3, pp. 336-346.

Pezzolo, L. 2007, 'Government Debts and Credit Markets in Renaissance Italy', *Department of Economics – Ca' Foscari University of Venice*, 05/WP/2007, pp. 1-19, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=989311 [Accessed on 2 September 2017].

Pierce, R.J., Shapiro, S.A., Verkuil, P.R. 1992, *Administrative Law and Process*, 2nd ed., Westbury, NY: Foundation Press.

Pilbeam, K. 2018, *Finance & Financial Markets*, London: Palgrave Macmillan Education.

Pirrong, C. 2010, 'Energy Derivatives', in *Financial Derivatives: Pricing and Risk Management*, R.W. Kolb. and J.A. Overdahl (eds.), Hoboken: John Wiley & Sons, Inc., pp. 125-133.

Poitras, G. 2009, 'From Antwerp to Chicago: The History of Exchange Traded Derivative Security Contracts', *Revue d'Histoire des Sciences Humaines*, 20, 1, pp. 11-50.

Poloner, S.H. 2010, 'Negotiating ISDA Master Agreement Schedules on Behalf of Foreign Hedge Funds', *Journal of Taxation*, 113, 4, pp. 226-241.

Posner, R.A. 2014, 'The Concept of Regulatory Capture: A Short, Inglorious History', in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, D. Carpenter and D.A. Moss (eds.), Cambridge: Cambridge University Press, pp. 49-56.

Potter, R.A., and Shipan, C.R. 2019, 'Agency Rulemaking in a Separation of Powers System', *Journal of Public Policy*, 39, 1, pp. 89-113.

Radaelli, C.M. 1995, 'The Role of Knowledge in the Policy Process', *Journal of European Public Policy*, 2, 2, pp. 159-183.

Raines, J.P and Leathers, C.G. 1994, 'Financial Derivative Instruments and Social Ethics', *Journal of Business Ethics*, 13, 3, pp. 197-204.

Rashin, S.D. 2020, *Essays on Private Influence on the Policymaking Process*, Doctoral Dissertation: ProQuest No. 22615673.

Rauterberg, G.V and Verstein, A. 2013, 'Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform', *Virginia Journal of International Law*, 54, 1, pp. 9-50.

Rechtschaffen, A.N. 2014, *Capital Markets, Derivatives and the Law*, Oxford: Oxford University Press.

Rein, M. and Schön, D. 1991, 'Frame-reflective Policy Discourse', in *Social Sciences and Modern States. National Experiences and Theoretical Crossroads*, P. Wagner, C.H. Weiss, B. Wittrock, and H. Wollman (eds.), Cambridge: Cambridge University Press, pp. 262-289.

Riley, D. 2007, 'Factors Affecting the Pursuit of Standards: A Theoretical Framework', *Marketing Review*, 7, 2, pp. 139-154.

Rinfret, S. 2009, *Changing the Rules: Interest Groups and Federal Environmental Rulemaking*, Doctoral Dissertation: UMI No. 3370642.

Rosenzweig, K.M. 2001, 'The Commodity Futures Modernization Act of 2000', *Journal of Investment Compliance*, 1, 4, pp. 43-46.

Rourke, F.E. 1969, *Bureaucracy, Politics, and Public Policy*, Boston: Little, Brown and Company.

Russo, T.A. and Vinciguerra, M. 1992, 'Regulation of US Derivatives and Title V of the Futures Trading Practices Act of 1992', *Journal of Financial Regulation and Compliance*, 1, 1, pp. 99-102.

Sabatier, P.A. 1986, 'Top-down and Bottom-up Approaches to Implementation Research: A Critical Analysis and Suggested Synthesis', *Journal of Public Policy*, 6, 1, pp. 21-48.

Sabatier, P.A. 1988, 'An Advocacy Coalition Framework of Policy Change and the Roles of Policy-Oriented Learning Therein', *Policy Sciences*, 21, 2, pp. 129-168.

Sabatier, P.A. 1998, 'The Advocacy Coalition Framework: Revisions and Relevance for Europe', *Journal of European Public Policy*, 5, 1, pp. 98-130.

Sabatier, P.A. and Jenkins-Smith, H.C. 1999, 'The Advocacy Coalition Framework: An Assessment', in *Theories of the Policy Process*, P.A. Sabatier (ed.), Boulder, CO: Westview Press, pp. 117-166.

Sabatier, P.A. and Weible, C. 2007, 'The Advocacy Coalition Framework: Innovations and Clarifications', in *Theories of the Policy Process* (2nd ed.), P.A. Sabatier (ed.), Boulder, CO: Westview Press, pp. 189-222.

Salter, M.S. 2008, *Innovation Corrupted: The Origins and Legacy of Enron's Collapse*, Cambridge, MA: Harvard University Press.

Sar, M. 2017, 'A Regulatory Retreat: Energy Market Exemption from Private Anti-Manipulation Actions Under the Commodity Exchange Act', *Fordham Journal of Corporate & Financial Law*, 22, 4, pp. 604-645.

Sargentich, T.O. 1993, 'The Administrative Process in Crisis – The Example of Presidential Oversight of Agency Rulemaking', *Administrative Law Journal of the American University*, 6, 4, pp. 710-720.

Saunders, B., Kitzinger, J., and Kitzinger, C. 2015, 'Participant Anonymity in the Internet Age: From Theory to Practice', *Qualitative Research in Psychology*, 12, 2, pp. 125-137.

Schaede, U. 1989, 'Forwards and Futures in Tokugawa-period Japan: A New Perspective on the Dōjima Rice Market', *Journal of Banking and Finance*, 13, 4, pp. 487-513.

Scholz, J.T. 1991, 'Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness', *American Political Science Review*, 85, 1, pp. 115-136.

Schwarcz, S.L. 2009, 'Regulating Complexity in Financial Markets', *Washington University Law Review*, 87, 2, pp. 211-268.

Senge, P.M. 2006, *The Fifth Discipline: The Art and Practice of the Learning Organization*, New York: Doubleday/Currency.

Shapiro, S. 2007, 'The Role of Procedural Controls in OSHA's Ergonomics Rulemaking', *Public Administration Review*, 67, 4, pp. 688-701.

Shipan, C. R. 2004, 'Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence', *American Political Science Review*, 98, 3, pp. 467-480.

Simon, H.A. 1955, 'A Behavioral Model of Rational Choice', *The Quarterly Journal of Economics*, 69, 1, pp. 99-118.

Smith, K.E. 2006, 'Problematising power relations in "elite" interviews', *Geoforum*, 37, 4, pp. 643-653.

Snow, N. 2007, 'CFTC report urges expansion of oversight to exempt markets', *Oil & Gas Journal*, 105, 44, pp. 26-28.

Spence, K. 2009, 'The Shadow Financial System', *Annual Review of Banking and Financial Law*, 29, pp. 98-106.

Staricco, J. 2017, 'Putting Culture in its Place? A Critical Engagement with Cultural Political Economy', *New Political Economy*, 22, 3, pp. 328-341.

Stassen, J.H. 1982, 'The Commodity Exchange Act in Perspective: A Short and Not-So-Reverent History of Futures Trading Legislation in the United States', *Washington and Lee Law Review*, 39, 3, pp. 825-843.

Stewart, R.B. 1987, 'Beyond Delegation Doctrine', *The American University Law Review*, 36, 1, pp. 323-344.

Stigler, G. 1971, ‘The Theory of Economic Regulation’, *The Bell Journal of Economics and Management Science*, 2, 1, pp. 3-21.

Stone, D. 2002, *Policy Paradox: The Art of Political Decision Making*, New York: W.W. Norton and Company.

Su. R, Bramwell, B., and Whalley, P.A. 2018, ‘Cultural political economy and urban heritage tourism’, *Annals of Tourism Research*, 68, pp. 30-40.

Sum, N. 2015, ‘Cultural political economy of competitiveness, competition, and competition policy in Asia’, *Distinktion: Journal of Social Theory*, 16, 2, pp. 211-228.

Sum, N. and Jessop, B. 2013, *Towards a Cultural Political Economy: Putting Cultural in its Place in Political Economy*, Northampton, MA: Edward Elgar.

Swan, E.J. 2000, *Building the Global Markets: A 4000-Year History of Derivatives*, The Hague: Kluwer Law International.

Taleb, N. 1997, *Dynamic Hedging: Managing Vanilla and Exotic Options*, New York: John Wiley & Sons, Inc.

Taleb, N.N. 2012, *Antifragile: Things That Gain from Disorder*, New York: Random House.

Taylor, S. 2004, ‘Researching educational policy and change in “new times”: using critical discourse analysis’, *Journal of Education Policy*, 19, 4, pp. 433-451.

Telser, L.G. and Higinbotham, H.N. 1977, ‘Organized Futures Markets: Costs and Benefits’, *Journal of Political Economy*, 85, 5, pp. 969-1000.

Terman, J. 2012, *Rulemaking as a Form of Bureaucratic Response*, Doctoral Dissertation: UMI No. 3519376.

The Monitor 2008, ‘CFTC Recommends Legislative Changes to Regulation of Exempt Commercial Markets’, *Banking & Financial Services Policy Report*, 27, 1, pp. 20-21.

Thompson, P. and Harley, B. 2012, ‘Beneath the Radar? A Critical Realist Analysis of “The Knowledge Economy” and “Shareholder Value” as Competing Discourses’, *Organization Studies*, 33, 10, pp. 1363-1381.

Tienhaara, K. 2013, ‘Corporations: business and industrial influence’, in *Routledge Handbook of Global Environmental Politics*, P.G. Harris (ed.), Hoboken: Taylor and Francis, pp. 164-175.

Titscher, S., Meyer, M., Wodak, R. and Vetter, E. 2007, *Methods of Text and Discourse Analysis*, London: SAGE.

Tyfield, D. 2015, ‘”What is to be Done?” Insights and Blind Spots from Cultural Political Economy(s)’, *Journal of Critical Realism*, 14, 5, pp. 530-548.

Underhill, G.R.D. 2015, ‘The Emerging Post-Crisis Financial Architecture: The Path-Dependency of Ideational Adverse Selection’, *The British Journal of Politics and International Relations*, 17, 3, pp. 461-493.

van Heur, B. 2010, ‘Beyond Regulation: Towards a Cultural Political Economy of Complexity and Emergence’, *New Political Economy*, 15, 3, pp. 421-444.

van Rooyen, M. 2013, ‘Structure and agency in news translation: An application of Anthony Giddens’ structuration theory’, *Southern African Linguistics and Applied Language Studies*, 31, 4, pp. 495-506.

Verger, A. Fontdevila, C., and Zancajo, A. 2017, ‘Multiple paths towards education privatization in a globalizing world: a cultural political economy review’, *Journal of Education Policy*, 32, 6, pp. 757-787.

Wagner, W., Barnes, K., and Peters, L. 2011, ‘Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards’, *Administrative Law Review*, 63, 1, pp. 99-158.

Wagner, W.E. 2010, ‘Administrative Law, Filter Failure, and Information Capture’, *Duke Law Journal*, 59, 7, pp. 1321-1432.

Waterman, R.W. and Meier, K.J. 1998, ‘Principal-agent models: An expansion?’, *Journal of Public Administration Research and Theory*, 8, 2, pp. 173-202.

Weber, E.J. 2009, ‘A Short History of Derivative Security Markets’ in *Vinzenz Bronzin’s Option Pricing Models: Exposition and Appraisal*, W. Hafner and H. Zimmermann (eds.), Berlin: Springer, pp. 431-466.

Weber, R.F. 2012, ‘Structural Regulation as Antidote to Complexity Capture’, *American Business Law Journal*, 49, 3, pp. 643-738.

Weible, C.M., Sabatier, P.A., Jenkins-Smith, H.C., Nohrstedt, D., Henry, A.D., and deLeon, P. 2011, ‘A Quarter Century of the Advocacy Coalition Framework: An Introduction to the Special Issue’, *The Policy Studies Journal*, 39, 3, pp. 349-360.

Weible, C.M., Sabatier, P.A., and McQueen, K. (2009), ‘Themes and Variations: Taking Stock of the Advocacy Coalition Framework’, *The Policy Studies Journal*, 37, 1, pp. 121-140.

West, W.F. 2004, ‘Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis’, *Public Administration Review*, 64, 1, pp. 66-80.

West, W.F. 2009, ‘Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls’, *Administration & Society*, 41, 5, pp. 576-599.

West, W.F. and Raso, C. 2013, ‘Who Shape the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control’, *Journal of Public Administration Research and Theory*, 23, 3, pp. 495-519.

White, F.L. and Stein, W.L. 1987, ‘New Off-Exchange Futures-Related Instruments: Modern Day “Bucket Shops” or Legitimate Products’, *The Journal of Futures Markets*, 7, 3, pp. 341-344.

Whittington, K.E. and Iuliano, J. 2017, ‘The Myth of the Nondelegation Doctrine’, *University of Pennsylvania Law Review*, 165, 2, pp. 379-431.

Widdowson, M. 2011, ‘Case Study Research Methodology’, *International Journal of Transactional Analysis Research*, 2, 1, pp. 25-34.

Williams, J.W. 2015, ‘Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof’, *Law & Policy*, 37, 1-2, pp. 199-152.

Wilson, J.Q. 1980, *The Politics of Regulation*, New York: Basic Books.

Woiceshyn, J. and Daellenbach, U. 2018, 'Evaluating Inductive vs Deductive Research in Management Studies: Implications for Authors, Editors, and Reviewers', *Qualitative Research in Organizations and Management: An International Journal*, 13, 2, pp. 183-195.

Wolkoff, N.L. and Werner, J.B. 2010, 'The History of Regulation of Clearing in the Securities and Futures Markets and its Impact on Competition', *Boston University School of Law Review of Banking & Financial Law*, 30, 1, pp. 313-381.

Woodside, A. 2003, 'Middle-range theory construction of the dynamics of organizational marketing-buying behavior', *Journal of Business & Industrial Marketing*, 18, 4/5, pp. 309-335.

Working Group 1999a, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management*, Report of The President's Working Group on Financial Markets: April 1999. Available at: https://www.treasury.gov/resource-center/fin-mkts/Documents/hedgfund.pdf [Accessed on 29 December 2017].

Working Group 1999b, *Over-the-Counter Derivatives Markets and the Commodity Exchange Act*, Report of The President's Working Group on Financial Markets: November 1999. Available at: https://www.treasury.gov/resource-center/fin-mkts/Documents/otcact.pdf [Accessed on 29 December 2017].

World Bank 2018, *GDP (current US$)*, [Online]. Available at: https://data.worldbank.org/indicator/NY.GDP.MKTP.CD. [Accessed: 10 January 2018].

Yackee, J.W. and Yackee, S.W. 2006, 'A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy', *The Journal of Politics*, 68, 1, pp. 128-139.

Yackee, J.W. and Yackee, S.W. 2009, 'Divided government and US federal rulemaking', *Regulation & Governance*, 3, 2, pp. 128-144.

Yackee, J.W. and Yackee, S.W. 2016, 'From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority', *Administrative Law Review*, 68, 3, pp. 395-443.

Yackee, S.W. 2003, *An Agent, but An Agent of Whom? Organized Interests and the U.S. Bureaucracy*, Doctoral Dissertation: UMI No. 3086656.

Yackee, S.W. 2006a, 'Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking', *Journal of Public Administration Research and Theory: J-PART*, 16, 1, pp. 103-124.

Yackee, S.W. 2006b, 'Assessing Inter-Institutional Attention to and Influence on Government Regulations', *British Journal of Political Science*, 36, 4, pp. 723-744.

Yackee, S.W. 2011, 'The Politics of *Ex Parte* Lobbying: Pre-Proposal Agenda Building and Blocking during Agency Rulemaking', *Journal of Public Administration Research and Theory*, 22, 2, pp. 373-393.

Yackee, S.W. 2014, ‘Reconsidering Agency Capture During Regulatory Rulemaking’, in *Preventing Capture: Special Interest Influence in Regulation, and How to Prevent It*, D. Carpenter and D. Moss (eds.), Cambridge: Cambridge University Press, pp. 292-325.

Yackee, S.W. 2019, ‘The Politics of Rulemaking in the United States’, *Annual Review of Political Science*, 22, pp. 37-55.

Yadav, Y. 2013, ‘The Problematic Case of Clearinghouses in Complex Markets’, *Georgetown Law Journal*, 101, 2, pp. 387-444.Yin, R.K. 2009, *Case Study Research: Design and Methods*, Thousand Oaks, CA: SAGE.

Young, M.D. and Stein, W.L. 1988, ‘Swap Transactions under the Commodity Exchange Act: Is Congressional Action Needed?’, *Georgetown Law Journal*, 76, 6, pp. 1917-1947.

Young. K. 2015, ‘Not by structure alone: power, prominence, and agency in American finance’, *Business and Politics*, 17, 3, pp. 443-472.

Ziegler, J.N. and Woolley, J.T. 2016, ‘After Dodd-Frank: Ideas and the Post-Enactment Politics of Financial Reform in the United States’, *Politics & Society*, 44, 2, pp. 249-280.

APPENDIX A

Active CFTC Chairpersons (January 22, 1993 – 2016) and Commissioners (2001 – 2016)[458]

CFTC Chairpersons, Active 1993 - 2016			
Name	**Title**	**Term**	**Initial Presidential Appointer**
William P. Albrecht	Acting Chairman	January 1993 - August 1993	Ronald Reagan
Sheila C. Blair	Acting Chairwoman	August 1993 - December 1993	George H.W. Bush
Barbara P. Holum	Acting Chairwoman	December 1993 - October 1994	Bill Clinton
Mary L. Shapiro	Chairwoman	October 1994 - January 1996	Bill Clinton
John E. Tull, Jr.	Acting Chairman	January 1996 - August 1996	Bill Clinton
Brooksley Born	Chairwoman	August 1996 - June 1999	Bill Clinton
David D. Spears	Acting Chairman	June 1999 - August 1999	Bill Clinton
William J. Rainer	Chairman	August 1999 - January 2001	Bill Clinton
James E. Newsome	Acting Chairman and Chairman	January 2001 - July 2004	Bill Clinton
Sharon Brown-Hruska	Acting Chairwoman	August 2004 - July 2005	George W. Bush
Reuben Jeffery, III	Chairman	July 2005 - June 2007	George W. Bush
Walter L. Lukken	Acting Chairman	June 2007 - January 2009	George W. Bush
Michael V. Dunn	Acting Chairman	January 2009 - May 2009	George W. Bush
Gary Gensler	Chairman	May 2009 - January 2014	Barack Obama
Mark P. Wetjen	Acting Chairman	January 2014 - June 2014	Barack Obama
Timothy G. Massad	Chairman	June 2014 - January 2017	Barack Obama

[458] Source: Former Commissioners. Available at: https://www.cftc.gov/About/Commissioners/FormerCommissioners/index.htm.

CFTC Commissioners, Active 2001 – 2016		
Name	**Term**	**Initial Presidential Appointer**
Barbara P. Holum	November 1993 - December 2003	Bill Clinton
David D. Spears	September 1996 - December 2001	Bill Clinton
Thomas J. Erickson	June 1999 - December 2001	Bill Clinton
Sharon Brown-Hruska	August 2002 - July 2006	George W. Bush
Walter L. Lukken	August 2002 - July 2009	George W. Bush
Michael V. Dunn	November 2004 - October 2011	George W. Bush
Frederick W. Hatfield	December 2004 - December 2006	George W. Bush
Jill E. Sommers	August 2007 - July 2013	George W. Bush
Bart Chilton	August 2007 - March 2014	George W. Bush
Scott D. O'Malia	October 2009 - August 2014	Barack Obama
Mark P. Wetjen	October 2011 - August 2015	Barack Obama
Sharon Y. Bowen	June 2014 - September 2017	Barack Obama
J. Christopher Giancarlo	June 2014 - July 2019	Barack Obama

APPENDIX B

Rulemaking-related Documents Cited in the Analyses of Part III

Document Name	Document Type
Agricultural Advisory Committee Meeting, 5 August 2010	Agency Meeting
Open Meeting on the Fourteenth Series of Proposed Rulemakings under the Dodd-Frank Act, 27 April 2011	Agency Meeting
Open Meeting to Consider Final Rule on Further Definition of the Term "Swap," Final Rule on the End-User Exemption to Clearing, and Proposed Rule to Exempt from Clearing Certain Swaps by Cooperatives, 10 July 2012	Agency Meeting
Open Meeting to Consider Two Final Rules, 12 April 2012	Agency Meeting
Opening Statement, Chairman Gary Gensler, Meeting of the Commodity Futures Trading Commission, December 16, 2010	Agency Meeting
Opening Statement, Commissioner Michael V. Dunn, Public Meeting on Proposed Rules Under Dodd-Frank Act, 19 November 2010	Agency Meeting
Letter from American Gas Association, 23 March 2012	Comment Letter
Letter from Amy Fisher, Cogen Technologies Linden Venture, L.P., 22 December 2014	Comment Letter
Letter from Amy Fisher, Cogen Technologies Linden Venture, L.P., 22 June 2015	Comment Letter
Letter from Andrew K. Soto, American Gas Association, 26 June 2012	Comment Letter
Letter from Arushi Sharma, American Gas Association, 17 April 2014	Comment Letter
Letter from Bartlett Naylor, Public Citizen, 19 December 2014	Comment Letter
Letter from Catherine Krupka on behalf of Edison Electric Institute and Electric Power Supply Association, 4 April 2011	Comment Letter
Letter from Christina Crooks, National Association of Manufacturers, 28 January 2015	Comment Letter
Letter from Christine M. Cochran on behalf the American Farm Bureau Federation, the American Soybean Association, the Commodity Markets Council, the National Association of Wheat Growers, the National Cattlemen's Beef Association, and the National Corn Growers Association, 28 October 2010	Comment Letter
Letter from Craig G. Goodman, National Energy Marketers Association, 26 June 2012	Comment Letter
Letter from David McIndoe, Sutherland Asbill & Brennan, L.L.P., on behalf of The Commercial Energy Working Group, 17 April 2014	Comment Letter
Letter from David Perlman, Bracewell & Giuliani on behalf of Coalition of Physical Energy Companies (COPE), 4 April 2011	Comment Letter
Letter from David Perlman, Bracewell & Giuliani, on behalf of the Coalition of Physical Energy Companies, 15 February 2013	Comment Letter
Letter from David Perlman, Bracewell & Giuliani, on behalf of the Coalition of Physical Energy Companies, 17 April 2014	Comment Letter

Letter from David Perlman, Bracewell & Giuliani, on behalf of the Coalition of Physical Energy Companies, 7 June 2012	Comment Letter
Letter from Dennis Kelleher, Better Markets, 12 October 2012	Comment Letter
Letter from Dennis Kelleher, Better Markets, 22 December 2014	Comment Letter
Letter from Dennis Kelleher, Better Markets, Inc., 22 July 2011	Comment Letter
Letter from Diane Moody, American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Power Institute, and Electric Power Supply Association, 15 February 2013	Comment Letter
1Letter from Janet Kelly, ConocoPhillips Company, 23 August 2012	Comment Letter
Letter from Joseph Kelliher, NextEra Energy Resources, 11 March 2011	Comment Letter
Letter from Lance Kotschwar, Gavilon Group, LLC, 4 April 2011	Comment Letter
Letter from Lisa Jacobson, Business Council for Sustainable Energy, 22 December 2014	Comment Letter
Letter from Lisa Yoho, BG Americas & Global LNG, 22 July 2011	Comment Letter
Letter from Lopa Parikh, Edison Electric Institute and Electric Power Supply Association, 17 April 2014	Comment Letter
Letter from Lopa Parikh, Edison Electric Institute, 26 June 2012	Comment Letter
Letter from Marcus Stanley, Americans for Financial Reform, 22 December 2014	Comment Letter
Letter from Mary Anne Mason, HoganLovells, LLP on behalf of Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas and Electric Company, 22 July 2011	Comment Letter
Letter from Matt Schatzman, BG Americas & Global LNG, 20 September 2010	Comment Letter
Letter from Michael Sweeney, Sutherland Asbill & Brennan, L.L.P., on behalf of the Commercial Energy Working Group, 26 June 2012	Comment Letter
Letter from Paige J. Lockett, EDF Trading North America, LLC, 22 December 2014	Comment Letter
Letter from Paul Hughes, Southern Company Services, Inc., 22 June 2015	Comment Letter
Letter from Paul J. Pantano, Jr. McDermott, Will & Emery on behalf of the Agricultural Commodity Swaps Working Group, 29 October 2010	Comment Letter
Letter from Paul M. Architzel, WilmerHale, on behalf of ONEOK, Inc., 22 July 2011	Comment Letter
Letter from Phillip Lookadoo, International Energy Credit Association, 26 June 2012	Comment Letter
Letter from R. Michael Sweeney, Jr., David T. McIndoe, and Mark W. Menzes, Hunton & Williams, LLP on behalf of Working Group of Commercial Energy Firms, 20 September 2010	Comment Letter
Letter from Robert Pickel, International Swaps and Derivatives Association (ISDA), 12 October 2012	Comment Letter
Letter from Russell D. Wasson on behalf of National Rural Electric Cooperative Association, American Public Power Association, and Large Public Power Council, 4 April 2011	Comment Letter

Letter from Russell Wasson, American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, and National Rural Electric Cooperative Association, 19 June 2015	Comment Letter
Letter from Ryan Barry, Commodity Markets Council, National Corn Growers Association, and Natural Gas Supply Association, 17 April 2014	Comment Letter
Letter from Ryan Barry, National Corn Growers Association & National Gas Supply Association, 22 December 2014	Comment Letter
Letter from Shane Skelton, American Petroleum Institute, 11 October 2012	Comment Letter
Letter from Stephen O'Connor, International Swaps and Derivatives Association, 22 December 2014	Comment Letter
Letter from Sweta Sethna, Plains All American Pipeline, L.P., 17 April 2014	Comment Letter
Testimony Before the U.S. House Committee on Agriculture, Chairman Gary Gensler, 21 June 2011	Congressional Testimony
Testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Chairman Gary Gensler, 17 February 2011	Congressional Testimony
Testimony of Chairman Gary Gensler before the House Committee on Agriculture, 10 February 2011	Congressional Testimony
Testimony of Chairman Gary Gensler before the Senate Committee on Banking, Housing, and Urban Affairs, 12 April 2011	Congressional Testimony
Testimony of Chairman Timothy Massad before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Washington, DC, Chairman Timothy Massad, 9 September 2014	Congressional Testimony
Testimony, Chairman Gary Gensler, House Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management, 15 December 2010	Congressional Testimony
Testimony, Chairman Gary Gensler, Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Securities, Insurance, and Investment and Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, 8 December 2010	Congressional Testimony
United States. Senate. Committee on Agriculture, Nutrition and Forestry. Commodity Futures Trading Commission Nominations of Timothy G. Massad, Sharon, Y. Bowen and J. Christopher Giancarlo. Hearings, March 6, 2014. 113th Congress 2nd Session	Congressional Testimony
CFTC No-Action Letter No. 12-06, 14 August 2012	No-Action Letter
CFTC No-Action Letter No. 13-08, 5 April 2013	No-Action Letter
CFTC No-Action Letter No. 16-10, 18 February 2016	No-Action Letter
Chairman's Letter, President's Budget and Performance Plan for Fiscal Year 2013, Chairman Gensler, 13 February 2012	Policymaker Speech
Gensler, G. (2012) Interviewed by Charlie Rose	Policymaker Speech
Remarks before the Institute of International Bankers, Chairman Gary Gensler, 21 October 2010	Policymaker Speech
Remarks of Chairman Timothy Massad before the Natural Gas Roundtable (Washington, D.C.), Chairperson Timothy Massad, 26 May 2015	Policymaker Speech

Remarks of Chairman Timothy Massad before the Energy Risk Summit USA 2015, Chairperson Timothy Massad, 12 May 2015	Policymaker Speech
Remarks of Chairman Timothy Massad before the National Energy Marketers Association, Chairperson Timothy Massad, 30 April 2015	Policymaker Speech
Remarks of Timothy G. Massad at the CME Global Financial Leadership Conference, Chairman Timothy Massad, 18 November 2014	Policymaker Speech
Remarks of Timothy G. Massad before the Coalition for Derivative End-Users, Chairperson Timothy Massad, 26 February 2015	Policymaker Speech
Remarks on Dodd-Frank at the 6th Annual Capital Markets Summit, Chairman Gary Gensler, 28 March 2012	Policymaker Speech
Remarks on Dodd-Frank Financial Reform at George Washington University Law School, Chairman Gary Gensler, 2 March 2012	Policymaker Speech
Remarks, Implementing the Dodd-Frank Act, FIA's Annual International Futures Industry Conference, Chairman Gary Gensler, 16 March 2011	Policymaker Speech
Agricultural Commodity Definition (2011)	Rule
Agricultural Swaps (2010)	Rule
Commodity Options (2012)	Rule
Commodity Options and Agricultural Swaps (2011)	Rule
Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)	Rule
Forward Contracts With Embedded Volumetric Optionality (2014)	Rule
Forward Contracts With Embedded Volumetric Optionality (2015)	Rule
Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (2011)	Rule
Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (2010)	Rule
Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (2012)	Rule
Swap Data Recordkeeping and Reporting Requirements (2012)	Rule
Trade Options (2015)	Rule
Trade Options (2016)	Rule

APPENDIX C

Informed Consent Form

Informed Consent Form

I, the undersigned, confirm that (please tick box as appropriate):

1.	I have read and understood the information about the project, as provided in the Information Sheet referenced to me by the Researcher.	☐
2.	I have been given the opportunity to ask questions about the project and my participation.	☐
3.	I voluntarily agree to participate in the project.	☐
4.	I understand I can withdraw at any time without giving reasons and that I will not be penalized for withdrawing nor will I be questioned on why I have withdrawn.	☐
5.	The procedures regarding confidentiality have been clearly explained (e.g. use of names, pseudonyms, anonymisation of data, etc.) to me.	☐
6.	The use of the data in research, publications, sharing and archiving has been explained to me.	☐
7.	I agree to allow the Researcher to have the interview transcribed by a transcription service provider.	☐
8.	Select only **one** of the following: • I would like my name used and understand what I have said or written as part of this study will be used in reports, publications and other research outputs so that anything I have contributed to this project can be recognised.	☐
	• I do not want my name used in this project.	☐
9.	I, along with the Researcher, agree to sign and date this informed consent form.	☐

Participant:

__________________________ ____________________________ _________________

Name of Participant Signature Date

Researcher:

__________________________ ____________________________ _________________

Name of Researcher Signature Date

APPENDIX D

Interview Information Sheet, 2017

Information Sheet

Research project title: The U.S. Regulation of OTC Commodity Derivatives, 1992-2017
Research investigator: Bryce Zedalis
Contact details of research investigator: s1419822@sms.ed.ac.uk

About the Project

- This project explores and analyzes changes in OTC commodity derivative regulation in the United States between 1992 and 2017. Further, this project will present the contextual setting in which the OTC commodity derivative markets and their regulation evolved, and will critically analyze the discourses, ideas, and imaginaries (together, semiotic practices) that have informed OTC commodity derivatives policymaking since 1992. As a result, interviews concerning the experiences, accounts, and reflections of policymakers and other stakeholders involved in regulating OTC commodity derivative markets are necessary to complete this research endeavor.

Who is responsible for the data collected in this study?

- Bryce Zedalis is the researcher and data collector for this project.
- Data for this project, specifically the interviews, will be stored electronically and will be transcribed so as to use in the final thesis. Upon the completion of the thesis, the electronic data will be deleted.
- The data collected through the interviews will be kept private and will only be utilized for research relating to the thesis.

What is involved in the interviews?

On our previously agreed upon date, we will engage in a qualitative interview. The data from this interview will be utilized in connection with the research project and will partially serve as the basis for critical analysis. Please note that as a part of this analysis, I will approach the interview data with a critical eye – thus, critiques of your accounts, recollections, and thoughts may be offered in the thesis.

Our interview will be loosely guided by an interview schedule with pre-set questions. Nevertheless, insofar as our conversation is germane to the topic of OTC commodity derivative regulation, I will encourage flexibility in conversation direction throughout the interview. Further, this interview will be audio recorded and I will take notes.

Post-interview correspondence may take place, should you be amenable to as much. Additionally, upon transcription of the interview, please feel free to request a copy of the interview transcript. With your approval, I may enlist the support of a transcription service to transcribe our audio recorded interview.

The projected completion date for this research project is the autumn of 2019.

<u>What are the risks involved in this interview?</u>

Two risks exist in connection with these interviews: (1) confidentiality of the interviewee and (2) discussions of topics which may be confidential.

To the first, you have the right to request that your interview be anonymized – a request that if made, I will make all reasonable efforts to anonymize the interview data. The techniques for anonymization include, but are not limited to, the following: (1) altering non-essential interviewee details and (2) employing multiple pseudonyms for an interviewee. Further, I am open to discussing any issues relating to the anonymization of the data with you at any point prior to, during, or after the interview. Nevertheless, please bear in-mind that while the data will be anonymized, anonymity cannot be guaranteed.

To the second, should our conversation include topics that you are aware could be considered confidential, two procedures will be followed. First, throughout the interview, I will seek to clarify the confidentiality of any such topics or statements. If need be, we can transition that segment of the interview to non-audio recorded. Second, after my review of the interview transcript, I may contact you with any concerns that I may have relating to possible confidential disclosures. This would allow for your input on the matter to clarify whether the disclosure was confidential.

<u>What are the benefits for taking part in this interview?</u>

As part of taking part in this research project, you are free to request and to receive a final copy of the approved thesis.

<u>What are your rights as a participant?</u>

Taking part in the study is voluntary. You may choose not to take part or subsequently cease participation at any time. Further, you have the right to request that your interview be anonymized, and we can discuss the process by which the interview will be anonymized. Nevertheless, please bear in-mind that while reasonable efforts will be made to anonymize your interview, anonymity cannot be guaranteed. Additionally, you may request copies of the interview transcript and of the final results of this project.

<u>Concerning payment or monetary benefits</u>

You will receive no payment for your participation. The data will not be used for commercial purposes. Therefore, you should not expect any royalties or payments from the research project in the future.

<u>For more information</u>

You may contact this project's supervisors:

Dr. Jay Wiggan
15a George Square
+44 131 650 3939

J.Wiggan@ed.ac.uk

Dr. Donald Mackenzie
15a George Square
+44 131 650 3980
DonaldMacKenziePA@ed.ac.uk

APPENDIX E

Glossary of Financial and Rulemaking Terms[459]

Brent Interpretation – "The Brent Interpretation, developed by the CFTC in 1990, provides a facts and circumstances test in determining whether a particular transaction constitutes an excluded forward contract" (Sar 2017: 612)

Central Counterparty – "A clearing organization"; see Clearinghouse (CFTC 2019)

Clearing – "The procedure through which the clearinghouse becomes the buyer to each seller of a futures contract or other derivative, and the seller to each buyer for clearing members" (CFTC 2019)

Clearinghouse – "An entity through which futures and other derivative transactions are cleared and settled. It is also charged with assuring the proper conduct of each contract's delivery procedures and the adequate financing of trading. A [clearinghouse] may be a division of a particular exchange, an adjunct or affiliate thereof, or a freestanding entity. Also called a clearing [organization], multilateral clearing organization, central counterparty, or clearing association" (CFTC 2019)

Collateral – Assets pledged to back a privately negotiated contract

Commercial End-User – True end-users of nonfinancial commodities – such as a natural gas-fired electrical plant – and commercial marketplace participants/commercial parties – such as nonfinancial commodity wholesalers, nonfinancial commodity storage and transportation companies, and energy and metals producers and processors.

Commercial Marketplace Participant – a nonfinancial business or actor that produces, utilizes, or handles a commodity; see Commercial End-User

Commercial Party – a nonfinancial business or actor (e.g., not a bank or pension fund)

Commodity – "A physical commodity such as an agricultural product [other than onions] or a natural resource as opposed to a financial instrument such as a currency or interest rate" (CFTC 2019)

Commodity Option – "An option on a commodity"; see Trade Option (CFTC 2019)

Commodity Swap – A swap on a commodity, such as crude oil

Counterparty – "The opposite party in a bilateral agreement, contract, or transaction, such as a swap" (CFTC 2019)

Delivery – "The tender and receipt of the actual commodity"; see Physical Settlement (CFTC 2019)

[459] Citations found in References list.

Derivative – "A contract the price of which is derived from the price of an underlying [asset]; examples of derivatives are futures, forwards, options and swaps" (Pilbeam 2018: 470)

Equity (stock) – "Share which represent ownership of a company" (Pilbeam 2018: 471)

Exchange Market – "A central marketplace such as a designated contract market with established rules and regulations where buyers and sellers meet to trade futures and options contracts or securities" (CFTC 2019)

Exchange-traded – A derivative traded on an exchange

Exclusion – A statutory requirement that something (e.g., a derivative contract) not be regulated by an administrative agency

Execution – The purchase or sale of a derivative contract, typically an option

Exempt Commercial Markets – Established by the Commodity Futures Modernization Act of 2000, a new legally defined entity which operated as a look-alike electronic futures exchange, but whose derivative transactions thereon were exempt from most CFTC regulation

Exempt Commodity – A commodity in energy and metals; see OTC Commodity Derivative

Exemption – An administrative agency's decision to exempt something (e.g., a derivative contract) – which is within its statutory jurisdiction – from regulation

Exercise – The invocation of the optional right to buy or to sell an asset

Financial Settlement – "A method of settling futures, options and other derivatives whereby the seller (or short) pays the buyer (or long) the cash value of the underlying commodity or a cash amount based on the level of an index or price according to a procedure specified in the contract" (CFTC 2019)

Forward Contract – "A contract to buy [or] sell a security or commodity at a predetermined price and at a predetermined date in the future" (Pilbeam 2018: 473)

Futures Contract – "[An exchange-traded,] standardized agreement to buy [or] sell a security [or a commodity] at a predetermined price at a given date in the future" (Pilbeam 2018: 473)

Hedging – "The process of undertaking a [derivative] transaction to reduce or eliminate risk" (Pilbeam 2018: 474)

ISDA Agreement – The master agreement used to govern swap transactions

Major Swap Participant – "1) A person that maintains a 'substantial position' in any of the major swap categories, excluding positions held for hedging or mitigating commercial risk and positions maintained by certain employee benefit plans for hedging or mitigating risks in the operation of the plan; (2) A person whose outstanding swaps create 'substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets'; (3) Any 'financial entity' that is 'highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency' and that maintains a 'substantial position' in any of the major swap categories." (CFTC 2019)

Margin – "The amount of money or collateral deposited by a customer with [its] broker, by a broker with a clearing member, or by a clearing member with a clearing organization" for a derivative transaction (CFTC 2019)

Nonfinancial Commodity – See OTC Commodity Derivative

Notional Value – Total nominal value of a derivative contract's asset position

Optionality – The quality of a derivative contract to contain some form of option (e.g., in regard to delivery obligation, commodity price, or commodity volume)

Options Contract – A contract for "the right but not the obligation to buy [or] sell shares, bonds, foreign exchange, commodities and so on at a given (exercise/strike) price at or before a predetermined date in the future" (Pilbeam 2018: 479)

OTC Commodity Derivative – A derivative contract in energy or metals that is traded over-the-counter

Over-the-counter Derivatives – "'Tailor made' derivative contracts that are not traded on organized exchanges but rather [directly between parties]" (Pilbeam 2018: 479)

Over-the-counter Market – "The trading of commodities, contracts, or other instruments not listed on any exchange. OTC transactions can occur electronically or over the telephone" (CFTC 2019)

Physical Settlement – "A provision in a futures contract or other derivative for delivery of the actual commodity to satisfy the contract"; see Delivery (CFTC 2019)

Position Limits – "The maximum position, either net long or net short, in one commodity future (or option) or in all futures (or options) of one commodity combined that may be held or controlled by one person (other than a person eligible for a hedge exemption) as prescribed by an exchange and/or by the CFTC" (CFTC 2019)

Premium – "The payment an option buyer makes to the option writer for granting an option contract" (CFTC 2019)

Speculation – "The undertaking of a long or short position in the financial [or commodity] markets in the [simple] hope of making a profit" (Pilbeam 2018: 483)

Swap Contract – A contract for "an exchange of cash flow obligations between two parties" (Pilbeam 2018: 484)

Swap Dealer – "The Dodd-Frank Act and subsequent CFTC rules, in general, identify a 'swap dealer' as any person who: 1. holds itself out as a dealer in swaps, 2. makes a market in swaps; 3. regularly enters into swaps with counterparties as an ordinary course of business for its own account, or 4. engages in activity causing itself to be commonly known in the trade as a dealer or market maker in swaps. The CFTC requires that persons engaged in these activities register as swaps dealers after they have reached a 'de minimis' [(minimum)] threshold, meaning that, the aggregate gross notional amount of the swaps, with certain exceptions, that the person enters into over the prior 12 months in connection with dealing activities exceeds $3 billion. (This threshold is currently set at $8 billion, as part of a phase-in period.)" (CFTC 2019)

Systemic Risk – "The risk that a default by one market participant will have repercussions on other participants due to the interlocking nature of financial markets. For example, Customer A's default in X market may affect Intermediary B's ability to fulfill its obligations in Markets X, Y, and Z" (CFTC 2019)

Trade Option – "A commodity option transaction in which the purchaser is reasonably believed by the writer to be engaged in business involving use of that commodity or a related commodity"; see Commodity Option (CFTC 2019)